No. 89-1448-CFX
Status: GRANTED

Title: Virginia Bankshares, Inc., et al., Petitioners
v.
Doris I. Sandberg, et al.

Docketed:
March 15, 1990

Court: United States Court of Appeals
for the Fourth Circuit

Counsel for petitioner: Shapiro,Stephen M.

Counsel for respondent: Hassett,Joseph M.

Entry	Date	Note	Proceedings and Orders
1	Mar 15 1990	G	Petition for writ of certiorari filed.
2	Apr 3 1990		Brief of respondents Doris I. Sandberg, et al. in opposition filed.
3	Apr 4 1990		DISTRIBUTED. April 20, 1990
4	Apr 6 1990	G	Motion of American Corporate Counsel Association for leave to file a brief as amicus curiae filed.
5	Apr 6 1990	G	Motion of American Bankers Association, et al. for leave to file a brief as amici curiae filed.
6	Apr 6 1990	X	Reply brief of petitioners Virginia Bankshares, Inc., et al. filed.
7	Apr 10 1990	G	Motion of American Bankers Association, et al. for leave to file an amended brief as amici curiae filed.
9	Apr 10 1990	X	Brief of respondents Doris I. Sandberg, et al. in opposition to motions of "ACCA" and American Bankers Assn., et al. for leave to file briefs amicus curiae filed.
10	Apr 23 1990		Motion of American Corporate Counsel Association for leave to file a brief as amicus curiae GRANTED.
11	Apr 23 1990		Motion of American Bankers Association, et al. for leave to file a brief as amici curiae GRANTED.
12	Apr 23 1990		Motion of American Bankers Association, et al. for leave to file an amended brief as amici curiae GRANTED.
13	Apr 23 1990		Petition GRANTED. limited to Questions 1 and 2 presented by the petition.
			**********
15	May 21 1990		Order extending time to file brief of petitioner on the merits until June 25, 1990.
16	Jun 25 1990	G	Motion of American Corporate Counsel Association, et al. for leave to file a brief as amici curiae filed.
17	Jun 25 1990	G	Motion of American Bankers Association, et al. for leave to file a brief as amici curiae filed.
18	Jun 25 1990		Brief amici curiae of SEC, et al. filed.
19	Jun 25 1990		Joint appendix filed.
20	Jun 25 1990		Brief of petitioners Virginia Bankshares, Inc., et al. filed.
27	Jul 2 1990	G	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
21	Jul 23 1990		SET FOR ARGUMENT TUESDAY, OCTOBER 9, 1990. (1ST CASE)
23	Jul 25 1990		Brief of respondents Doris I. Sandberg, et al. filed.
24	Jul 25 1990	X	Brief amicus curiae of National Assoc. of Securities & Commerical Law Attorneys filed.
22	Jul 26 1990		CIRCULATED.

No. 89-1448-CFX

Entry	Date	Note	Proceedings and Orders
25	Aug 16 1990		Record filed.
		*	Certified record, 5 boxes, 48 volumes, received.
26	Aug 24 1990	X	Reply brief of petitioners Virginia Bankshares, Inc., et al. filed.
28	Aug 30 1990		Motion of American Corporate Counsel Association, et al. for leave to file a brief as amici curiae GRANTED.
29	Aug 30 1990		Motion of American Bankers Association, et al. for leave to file a brief as amici curiae GRANTED.
30	Aug 30 1990		Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
31	Oct 9 1990		ARGUED.

89- 1448

No.

Supreme Court, U.S.
FILED
MAR 16 1990
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1989

VIRGINIA BANKSHARES, INC., ET AL., PETITIONERS,

v.

DORIS I. SANDBERG, ET AL., RESPONDENTS.

FIRST AMERICAN BANKSHARES, INC., ET AL., PETITIONERS,

v.

PAUL H. WEINSTEIN, ET AL., RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOHN S. STUMP
McGuire, Woods, Battle & Boothe
8280 Greensboro Drive
Post Office Box 9346
McLean, Virginia 22102

LEWIS T. BOOKER
Hunton & Williams
707 East Main Street
Post Office Box 1535
Richmond, Virginia 23212

STEPHEN M. SHAPIRO
Counsel of Record
ANDREW L. FREY
KENNETH S. GELLER
LAWRENCE C. MARSHALL
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 463-2000

Counsel for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether Section 14(a) of the Securities Exchange Act of 1934 requires proxy statements not only to disclose material facts, but also to disclose alleged ulterior motivations of corporate directors and to characterize disclosed facts in a pejorative manner.

2. Whether a plaintiff may invoke an implied cause of action for damages under Section 14(a) of the Securities Exchange Act of 1934 when the allegedly misleading proxy statement could not possibly have affected the outcome of the proxy vote, and the plaintiff has not demonstrated causation in any other way. This is a question that the Court explicitly left open in *Mills* v. *Electric Auto-Life Co.*, 396 U.S. 375, 385 n.7 (1970).

3. Whether a reviewing court may uphold a general jury verdict when some of the grounds of liability submitted to the jury were invalid and there is no way of knowing whether the jury based its verdict on an allegation that is sustainable on review.

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

In addition to the parties named in the caption, the following persons were defendants in the district court and appellants in the court of appeals and are petitioners in this Court:

Emanuel A. Baker, Jr.
Harriet F. Bradley
Thomas B. Chamberlin
Sidney O. Dewberry
Eric W. Erdossy
Charles T. Lindsay, Jr.
Linda H. Michael
E. Guy Ridgely
Charles H. Smith, Jr.
Henry A. Thomas
Jack W. Beddow
Joel T. Broyhill
Thomas P. Chisman
Milton L. Drewer, Jr.
George W. Johnson
Donald R. Maxfield
Milton V. Peterson
Glenn W. Saunders
Verlin W. Smith
Stephen G. Yeonas

In addition to the parties named in the caption, the following persons and corporations were plaintiffs in the district court and appellees in the court of appeals and are respondents in this Court:

Roslyn L. Weinstein
Richard Weinstein
Leonard Weinstein
Gary Plushnick
William B. Dockser
Philip Gross
John P. Kyle
Robert I. Schattner
Dante E. Guazzo
Helene D. Engel
Barbara L. Eller
W. G. Dolvin
Kathryn M. Everhart
Omer L. Hirst
Dorothy Fowler Cooper
Edward S. Loveless
Elizabeth K. Puzak
Said Haddad
Joseph B. Latshaw, Jr.
Claude E. Keener, Sr.
Luther A. Gilliam
William L. Mason
Jane M. Dinunzio
Stephen Hartwell
Ethel J. Reid
Patricia Hooker Bonnes
Kathryn Hooker Spradlin
Eugene Hooker Walter
Rebecca Weybright
Anne Carol Weybright
Robert and Bernice Walter
Stephen W. Hartwell, II
Edwin Lynch
Clarice Brault
Jay Weinstein
Helen Weinstein

Evelyn Bushwick
Carol Plushnick
Laura Lee Cookson
Nancy Gross
Kay Kyle
Helen Mackey Gray
General Harry J. Engel
Joseph M. Eller
Henry P. Deyerle
Cynthia B. Dolvin
Norman T. Henry
Katherine Ann Johnson
Thelma H. Loehler
Michael A. Puzak
Benjamin Weiner
Harold E. Shomo
P. S. Webb Co.
Claude E. Keener, Jr.
Foundation for Middle East Peace
Rudolph A. Dinunzio
Anna C. Hooker
Dorothy V. Tobin
Suzanne Hooker Evans
Joseph Edmund Hooker
Mary Helen Walter
Steven Daniel Weybright
David Hooker Weybright
Nokesville Church of the Brethren
Elizabeth H. Nixon
Anthony Colasanto
Helen M. Lynch

Petitioner First American Bankshares, Inc. is the parent company of petitioner Virginia Bankshares, Inc. Neither company has subsidiaries other than wholly-owned subsidiaries.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT	ii
TABLE OF AUTHORITIES	vii
OPINIONS BELOW	1
JURISDICTION	1
STATEMENT	2
REASONS FOR GRANTING THE PETITION	9
I. FEDERAL PROXY LAW REQUIRES DISCLOSURE OF MATERIAL FACTS BUT DOES NOT COMPEL DIRECTORS TO ACCUSE THEMSELVES OF BREACHING THEIR FIDUCIARY DUTY OR TO CHARACTERIZE DISCLOSED FACTS IN A PEJORATIVE MANNER	11
A. The Fourth Circuit's Holding That Directors Have A Duty To Disclose Their Subjective Motivations And Beliefs Is Incorrect And Inconsistent With Decisions Of This Court And Other Circuits	12
B. The Fourth Circuit's Holding That Directors Have A Duty To Pejoratively Characterize Facts They Disclose Is Incorrect And Inconsistent With Decisions Of This Court And Other Circuits	17
II. AN IMPLIED CAUSE OF ACTION FOR DAMAGES UNDER FEDERAL PROXY LAW REQUIRES PROOF OF TRANSACTION AND LOSS CAUSATION	19

TABLE OF CONTENTS—Continued

Page

A. Recovery Under Section 14(a) Is Limited To Shareholders Who Are Injured By Distortion Of The Voting Process 20

B. Even If Non-Voting Injuries Are Cognizable Under Section 14(a), Actual Causation Must Still Be Proved 23

III. A REVIEWING COURT MAY NOT UPHOLD A GENERAL JURY VERDICT THAT MIGHT HAVE BEEN BASED ON AN INVALID THEORY OF LIABILITY 27

CONCLUSION 30

TABLE OF AUTHORITIES

CASES: Page

Alabama Farm Bureau Mutual Casualty Co. v. *American Fidelity Life Ins. Co.*, 606 F.2d 602 (5th Cir. 1979), cert. denied, 449 U.S. 820 (1980) 14, 17, 25

Avins v. *White*, 627 F.2d 637 (3d Cir.), cert. denied, 449 U.S. 982 (1980) 28

Basic Inc. v. *Levinson*, 485 U.S. 224 (1988) 24, 26

Bastian v. *Petren Resources Corp.*, 892 F.2d 680 (7th Cir. 1990) 26

Biesenbach v. *Guenther*, 588 F.2d 400 (3d Cir. 1978) 14, 15

Blue Chip Stamps v. *Manor Drug Stores*, 421 U.S. 723 (1975) 10

Briggs v. *Spaulding*, 141 U.S. 132 (1891) 19

Brochu v. *Ortho Pharmaceutical Corp.*, 642 F.2d 652 (1st Cir. 1981) 28

Cannon v. *University of Chicago*, 441 U.S. 677 (1979) 22

Carlson v. *Green*, 446 U.S. 14 (1980) 22

Culli v. *Marathon Petroleum Co.*, 862 F.2d 119 (7th Cir. 1988) 28

Data Probe Acquisition Corp. v. *Datatab, Inc.*, 722 F.2d 1 (2d Cir. 1983), cert. denied, 465 U.S. 1052 (1984) 16

Dudley v. *Dittmer*, 795 F.2d 669 (8th Cir. 1986) 28

Field v. *Trump*, 850 F.2d 938 (2d Cir. 1988), cert. denied, 109 S.Ct. 1122 (1989) 13, 14

Goldberg v. *Meridor*, 567 F.2d 209 (2d Cir. 1977), cert. denied, 434 U.S. 1069 (1978) 17

Golub v. *PPD Corp.*, 576 F.2d 759 (8th Cir. 1978) 15, 17

Healey v. *Catalyst Recovery of Pennsylvania, Inc.*, 616 F.2d 641 (3d Cir. 1980) 25

J.I. Case Co. v. *Borak*, 377 U.S. 426 (1964) 20, 22, 23

Kademian v. *Ladish Co.*, 792 F.2d 614 (7th Cir. 1986) 14

Kas v. *Financial General Bankshares, Inc.*, 796 F.2d 508 (D.C. Cir. 1986) 13, 14, 16, 17

Kennecott Copper Corp. v. *Curtiss-Wright Corp.*, 584 F.2d 1195 (2d Cir. 1978) 18

TABLE OF AUTHORITIES—Continued

	Page
Kidwell ex rel. Penfold v. *Meikle*, 597 F.2d 1273 (9th Cir. 1979)	25
Klamberg v. *Roth*, 473 F. Supp. 544 (S.D.N.Y. 1979)	18
Lessler v. *Little*, 857 F.2d 866 (1st Cir. 1988), cert. denied, 109 S.Ct. 1130 (1989)	18
Madison Consultants v. *FDIC*, 710 F.2d 57 (2d Cir. 1983)	25
McMurray v. *Deere & Co.*, 858 F.2d 1436 (10th Cir. 1988)	28
Mills v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970)	8, 19, 20, 21, 24
Murphy v. *United States*, 653 F.2d 637 (D.C. Cir. 1981)	28
Panter v. *Marshall Field & Co.*, 646 F.2d 271 (7th Cir.), cert. denied, 454 U.S. 1092 (1981)	14
Piper v. *Chris-Craft Industries*, 430 U.S. 1 (1977)	21, 22, 23
Radol v. *Thomas*, 534 F. Supp. 1302 (S.D. Ohio 1982), later proceeding 556 F. Supp. 586 (S.D. Ohio 1983), aff'd on other grounds, 772 F.2d 244 (6th Cir. 1985), cert. denied, 477 U.S. 903 (1986)	18
Santa Fe Industries v. *Green*, 430 U.S. 462 (1977)	*passim*
Schlick v. *Penn-Dixie Cement Corp.*, 507 F.2d 374 (2d Cir. 1974), cert. denied, 421 U.S. 976 (1975)	*passim*
Shearson/American Express Inc. v. *McMahon*, 482 U.S. 220 (1987)	23
Smillie v. *Park Chemical Co.*, 466 F. Supp. 572 (E.D. Mich. 1979)	21
Smith v. *Southern Airways, Inc.*, 556 F.2d 1347 (5th Cir. 1977)	28
Sunkist Growers, Inc. v. *Winckler & Smith Co.*, 370 U.S. 19 (1962)	28
Swanson v. *American Consumers Industries*, 475 F.2d 516 (7th Cir. 1973)	21, 23, 24

TABLE OF AUTHORITIES—Continued

	Page
Syufy Enterprises v. *American Multicinema, Inc.*, 793 F.2d 990 (9th Cir. 1986), cert. denied, 479 U.S. 1031 (1987)	28
Thompson v. *Thompson*, 484 U.S. 174 (1988)	22, 23
TSC Industries v. *Northway, Inc.*, 426 U.S. 438 (1976)	9, 16, 19, 20, 23, 29
United Pilots Ass'n v. *Halecki*, 358 U.S. 613 (1959)	28
Wilmington Star Mining Co. v. *Fulton*, 205 U.S. 60 (1907)	27, 28
Yentsch v. *Texaco, Inc.*, 630 F.2d 46 (2d Cir. 1980)	28
STATUTES AND REGULATIONS:	
15 U.S.C. § 78n(a)	*passim*
15 U.S.C. § 78aa	11
15 U.S.C. § 78bb(a)	10
Va. Code Ann. § 13.1-692.1	9, 15
Va. Code Ann. § 13.1-716	2
Va. Code Ann. § 13.1-718E	3
12 C.F.R. § 335.206	6
17 C.F.R. § 240.14a-9	6
MISCELLANEOUS:	
3B H. Bloomenthal, *Securities and Federal Corporate Law* (rev. ed. 1989)	27
Gelb, *Rule 10b-5 and Santa Fe—Herein of Sue Facts, Shame Facts, and Other Matters*, 87 W. Va. L. Rev. 189 (1985)	21
Hanks, *Evaluating Recent State Legislation on Director and Officer Liability Limitation and Indemnification*, 43 Bus. Law. 1207 (1988)	15
T. Hazen, *Treatise on the Law of Securities Regulation* (2d ed. 1990)	22
R. Jennings & H. Marsh, *Securities Regulation* (6th ed. 1987)	26, 27
L. Loss, *Fundamentals of Securities Regulation* (1988)	26

TABLE OF AUTHORITIES—Continued

	Page
2 Model Business Corporation Act Annotated (3d ed. Supp. 1989)	15
Ratner, *"Federal Corporation Law" Before and After Santa Fe Industries v. Green*, in *9th Annual Institute on Securities Regulation* 305 (PLI 1978)	15

In the Supreme Court of the United States

OCTOBER TERM, 1989

No.

VIRGINIA BANKSHARES, INC., ET AL., PETITIONERS,

v.

DORIS I. SANDBERG, ET AL., RESPONDENTS.

FIRST AMERICAN BANKSHARES, INC., ET AL., PETITIONERS,

v.

PAUL H. WEINSTEIN, ET AL., RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners respectfully request the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in these cases.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-26a) is reported at 891 F.2d 1112. The district court issued no written opinion in this case.

JURISDICTION

The court of appeals entered its judgment on December 15, 1989 (App., *infra*, 4a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

The Merger. This litigation grows out of a merger in May 1987 involving First American Bank of Virginia ("Bank") and petitioner Virginia Bankshares, Inc. ("VBI"), which is a wholly-owned subsidiary of petitioner First American Bankshares, Inc. ("FABI"). Prior to the merger, VBI owned 85% of the Bank's stock. Approximately 2,000 minority shareholders owned the remaining 15%. C.A. App. 67. The Bank had a majority of independent directors, who themselves owned 8% of the minority shares. App., *infra*, 46a. Because of long-term planning needs and the increased costs and reporting requirements associated with public ownership of a minority stock interest, the Chairman of FABI's board of directors, Clark M. Clifford, concluded that it would be prudent for FABI to propose a merger whereby the minority shareholders of the Bank would receive fair value for each of their shares as provided for by Virginia law. C.A. App. 1032-1033; see Va. Code Ann. § 13.1-716 *et seq.*

To assist it in reaching a decision regarding a fair price to offer for the minority shares, FABI engaged the services of an outside investment banking firm, Keefe, Bruyette & Woods, Inc. ("KBW"), to give its opinion on a price that would be fair from a financial point of view. KBW considered a variety of relevant factors, including the current and historical market prices of the shares and the fact that at no time had the Bank's shares sold for more than $33 per share. C.A. App. 1324. Given the substantial trading in the Bank's shares during the three years prior to the merger (764 trades involving 343,108 shares), the trading price was considered to be a significant indicator of value. C.A. App. 955.[1] KBW issued

[1] Another factor considered to be highly relevant was an undersubscribed rights offering by the Bank in March 1986. The Bank had offered 25,771 shares to the minority shareholders at $30 per share, with each shareholder entitled to purchase one share for every 28 shares already owned. Even at this below-market price, however, fewer than half the eligible minority shareholders exercised their rights, and only 15,024 of the shares were purchased by minority shareholders. C.A. App. 1323.

an opinion letter which, after describing the terms of its employment by FABI and the facts it took into account in assessing the shares' value, declared that "we are of the opinion that $42 per share represents a fair price for the shares of the First American Bank of Virginia not currently owned by [FABI]." App., *infra*, 75a-76a.

After FABI presented its merger proposal to the Bank, the Bank's board of directors appointed a special executive committee of directors to evaluate the proposal. That committee met to consider FABI's offer and later heard a presentation from the KBW appraiser who had evaluated the shares. Although the committee considered retaining another investment banking firm to render a second fairness opinion, it concluded that this was unnecessary given the large premium above market price (approximately 30%) represented by the offer of $42 per share and KBW's confirmation of the fairness of the offer. C.A. App. 758. In February 1987, the Bank's board, acting on the recommendation of the executive committee, voted unanimously to approve the proposed merger. App., *infra*, 53a.

The Proxy Solicitation. In accordance with Virginia law, a proxy statement describing the proposed merger was prepared and sent to each stockholder in preparation for the annual stockholders' meeting. Since FABI owned 85% of the Bank's shares, it had far more than the two-thirds needed to effectuate the merger without consent from any of the minority shareholders. See Va. Code Ann. § 13.1-718E. Nonetheless, the proxy statement contained 35 pages of information regarding the merger, including a copy of the proposed merger agreement and the KBW opinion letter. App., *infra*, 34a-76a.

The proxy statement reported that the merger "has been approved by the Board of Directors because it pro-

vides an opportunity for the Bank's public shareholders to achieve a high value for their shares. The price to be paid is about 30% higher than the $32.50 per share at which the Bank's common stock traded on February 8, 1987, the last trading day prior to the announcement of the proposal." App., *infra*, 53a-54a. The proxy statement also described the controlling shareholder's interest in the merger, explaining that the "proposed Merger will enable the Resulting Bank to compete more effectively, provide the opportunity to realize certain economies, and result in an institution better able to respond to technological change." *Id.* at 38a.

To inform minority shareholders of facts that might be deemed relevant in assessing the board's recommendation, the proxy statement disclosed exactly how many shares each director owned. It also explained that the "Bank has had, and expects to have in the future, banking transactions in the ordinary course of its business with directors, officers, principal shareholders, and their associates." App., *infra*, 51a. The proxy statement added that the "Board of Directors of the Bank as comprised prior to the Effective Date of the Merger will continue to serve as the Board of Directors of the Resulting Bank." *Id.* at 59a.

The proxy statement further stated that "FABI's Board of Directors commissioned Keefe, Bruyette & Woods, Inc. ('KBW'), an independent investment banking firm, to pass on the fairness of the Merger from a financial point of view." *Id.* at 38a. After setting forth KBW's qualifications to evaluate the shares, the proxy statement described in detail the terms of KBW's engagement:

> For rendering its opinion to FABI, Keefe, Bruyette & Woods, Inc. will be paid $25,000, and if the Merger is consummated will be paid an additional fee of $75,000. In addition, FABI will reimburse Keefe, Bruyette & Woods, Inc., for all of its reasonable out-of-pocket disbursements and expenses and has extended to Keefe, Bruyette & Woods, Inc. indemnification arrangements usual in such engagements.

Id. at 55a. The terms of KBW's compensation also were set forth in KBW's opinion letter, which was attached to the proxy statement.

At the April 21, 1987 meeting of the shareholders, the proposed merger received overwhelming approval by 97% of the shares voted. In addition to FABI's votes, over 70% of the minority shares were voted in favor of the proposal. C.A. App. 342.

The State Court Litigation. Not all shareholders were satisfied with the price they would receive under the merger plan. Six days before the scheduled meeting of the shareholders, Paul H. Weinstein and 12 other shareholders filed an action in the Circuit Court of Fairfax County, Virginia seeking to enjoin the meeting and the merger. The plaintiffs alleged, *inter alia*, that the "$42 per share that defendants propose to pay complainants and other minority shareholders is far less than the true value of the shares." C.A. App. 36. The complaint, which was based on information set forth in the proxy statement, alleged that the directors acted improperly in relying on the KBW assessment because they "failed to conduct any independent investigation of the fairness of the proposed Merger and, specifically, failed to retain any independent financial advisor to advise the Directors as to the fairness of the plan and of the price being imposed on the minority stockholders." *Id.* at 37.

The Virginia court denied relief, explaining that Virginia's statutory appraisal remedy for dissenting shareholders does not cover banks and that "[c]omplainants may not obtain that which the legislature has taken away by masking their request as the enforcement of an equitable duty." App., *infra*, 32a-33a. The court acknowledged that minority shareholders would have an action at law if the directors breached their fiduciary duties or engaged in fraud, but it ruled that the "complainants have not alleged facts sufficient to support either of these

claims." *Ibid.* In light of the Virginia trial court's decision, which the Virginia Supreme Court later declined to review, the annual meeting of shareholders proceeded as planned, and the merger was approved.

The Federal Court Litigation. On March 14, 1988, another shareholder, Doris I. Sandberg, appearing through the same counsel, filed a class action in the United States District Court for the Eastern District of Virginia. Much like the previous state law complaint, the federal complaint alleged breach of fiduciary duty based on the supposed inadequacy of the $42 per share received by minority shareholders. But this complaint also alleged that FABI, VBI, and the individual directors of the Bank had violated Section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(a), by issuing a proxy statement that "contained misstatements of material fact and failed to disclose material facts necessary to make the statements made not misleading." C.A. App. 73.[2]

The district court refused to certify a class of minority shareholders. It also declined to allow a group of plaintiffs, led again by Paul H. Weinstein, to intervene in the *Sandberg* litigation. The federal claim therefore proceeded to trial as an individual action involving a shareholder who owned 2,442 shares and who claimed that the proxy statement contained six misstatements or omissions concerning the merger transaction. App., *infra*, 15a-17a. The jury returned a general verdict for the plaintiff on the federal count in the amount of $43,956, or $18 per share. On the state law claim of breach of fiduciary duty, the jury found in favor of the two corporate defendants but against the 20 individual Bank directors, assessing damages in the same amount.

[2] Section 14(a) makes it unlawful to solicit a proxy in contravention of rules and regulations prescribed by the SEC or a federal bank regulatory agency. The prohibition of material misstatements or omissions contained in the FDIC regulation governing this case, 12 C.F.R. § 335.206, is substantially identical to the SEC's regulation contained in 17 C.F.R. § 240.14a-9.

While the *Sandberg* litigation was pending, a group of 67 plaintiffs who owned 182,902 shares, led once again by Paul H. Weinstein, filed a separate action in federal court. After the *Sandberg* verdict was rendered, these plaintiffs moved for summary judgment, asking the court to apply the doctrine of non-mutual offensive collateral estoppel. Over petitioners' objection, the district court applied this doctrine and granted summary judgment for these plaintiffs, awarding them the $18 a share that the jury previously had awarded Mrs. Sandberg, for a total of $3.3 million. App., *infra*, 28a-29a.[3]

The Decision Of The Court Of Appeals. On petitioners' appeal, the Fourth Circuit affirmed the *Sandberg* judgment and the grant of summary judgment in *Weinstein*. The panel held that two of the six alleged misstatements that had been presented to the jury could support liability under Section 14(a).

The court of appeals first ruled that the proxy statement falsely described the motives and beliefs of the Bank's directors, who had recommended the merger in the proxy statement for the reason that the price reflected a substantial premium over market price for minority shareholders. According to the court, "the jury was certainly justified in believing that the directors did not believe a merger at $42 per share was in the minority stockholders' interest but, rather, that they voted as they did for other reasons, *e.g.*, retaining their seats on the board." App., *infra*, 15a.

The court of appeals next ruled that it was deceptive for the proxy statement to describe KBW as "an independent investment banking firm." The court concluded that the implication in the proxy statement that KBW made "an independent determination could certainly have been found to be a material misrepresentation." App., *infra*, 16a.

[3] The court similarly granted summary judgment on the state law claims, but because of Virginia's statutory limit on directors' liability, this alternative award was limited to $2.3 million.

Because of the general verdict that the jury returned, there could be no assurance that the jury had, in fact, predicated liability on either of these allegations. App., *infra*, 16a n.3. Nonetheless, the court of appeals refused to consider whether the four other allegations presented to the jury set forth valid claims under Section 14(a), holding that "the submission of both correct and incorrect factual bases supporting a single theory of recovery is not grounds for reversal of a judgment on a general verdict." *Id.* at 17a.

The court of appeals also deemed it irrelevant that plaintiff Sandberg "admitted lack of reliance" on the allegedly misleading proxy statement and that the minority shareholders had no means of blocking the merger. App., *infra*, 11a. Under Virginia law, FABI's ownership of 85% of the Bank's shares gave it the right to effect the merger even if every one of the minority shareholders voted against it.[4] Although the court of appeals recognized that this Court had previously left open the question whether causation could be established under these circumstances, *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 385 n.7 (1970), the court proceeded to announce a rule that entirely dispensed with any need to show causation. App., *infra*, 12a-13a (citing *Schlick* v. *Penn-Dixie Cement Corp.*, 507 F.2d 374 (2d Cir. 1974)). The court declared that "if the proxy statement contained material misrepresentations and was an essential link in the merger, § 14(a) liability may be established" even though the individual plaintiff could not prove "reliance" on the proxy statement and even though "the minority's voting strength is insufficient to halt [the] merger." App., *infra*, 14a. The damages

[4] The proxy statement expressly informed the shareholders of this fact, noting that "the Plan of Merger must be approved by the vote of more than two-thirds of the outstanding Bank common stock entitled to vote. Because Virginia Bankshares owns more than the requisite minimum, and has indicated its intention of voting for the Plan of Merger, the Bank's Board of Directors expects the Plan of Merger to be approved." App., *infra*, 52a.

caused by the allegedly erroneous statements in the proxy solicitation, the court ultimately concluded, were the difference between the price the minority shareholders actually received ($42 per share) and the price asserted by plaintiff's expert witness to represent the stock's "inherent value" ($60 per share). *Id.* at 20a.

On plaintiff Sandberg's cross-appeal, the court of appeals reversed the trial court's refusal to certify a class of all minority shareholders. The result of this ruling is that the $43,956 judgment that the jury awarded to Sandberg might now be transformed on remand into a judgment in excess of $13 million. App., *infra*, 11a.[5]

REASONS FOR GRANTING THE PETITION

This Court has recognized that the federal securities laws were not designed to federalize the "wide variety of corporate conduct traditionally left to state regulation." *Santa Fe Industries* v. *Green*, 430 U.S. 462, 478 (1977). Accordingly, federal regulation of proxy statements is addressed not to enforcing fiduciary duties imposed by state law, but to ensuring that issues calling for shareholder vote are "fairly presented." *Id.* at 474; see also *TSC Industries* v. *Northway, Inc.*, 426 U.S. 438, 444 (1976) (Section 14(a) "'was intended to promote the free exercise of the voting rights of stockholders'"). The substantive fairness of a transaction is, and always has been, a matter of state law. It follows that the damages awarded for a breach of the federal securities laws are not measured by what is needed to provide shareholders with an appraisal remedy, or a price that the jury determines would have been "fair." Rather, recovery is

[5] The liability of the individual directors on the state law claims arising out of this transaction is subject to a statutory cap and cannot exceed $2.3 million, no matter how large the class. See Va. Code Ann. § 13.1-692.1. Because the directors' liability under the federal count is greater than that under the state law count, and because the corporate petitioners were exonerated under the state law count, it is clear that the judgments below cannot be sustained on state law grounds alone.

limited by statute to "actual damages on account of the act complained of"—*i.e.*, damages caused by the alleged infraction of federal proxy law. 15 U.S.C. § 78bb(a). The Fourth Circuit's decision in this case cannot be squared with these principles and conflicts with appellate decisions from several other circuits.

First, by holding that a proxy statement violates federal law if it fails to accuse the directors of breaching their fiduciary duty and acting on selfish motivations, the decision expands the scope of federal proxy regulation to include the entire spectrum of state fiduciary law. The Fourth Circuit's open-ended view of disclosure obligations under Section 14(a) effectively exposes every proxy statement used in a merger transaction to burdensome class action litigation. It would be the rare case in which a plaintiffs' lawyer could not claim that the reasons given for the proposed corporate action were not the "real" ones and could not allege the existence of some unexpressed subjective motivation on the part of individual members of the board. By the same token, there would be no practical limit on the ability of plaintiffs' counsel to challenge the choice of words used in a proxy statement if, as the Fourth Circuit ruled in condemning the description of the investment banker in this case, each characterization of accurately disclosed facts is subject to editorial second-guessing by a jury. The rationale of the Fourth Circuit therefore raises "a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 739 (1975), cited in *Santa Fe*, 430 U.S. at 479.

Second, by allowing plaintiffs to recover damages that were in no way caused by the alleged misrepresentations in the proxy statement, the Fourth Circuit has transformed federal proxy law into an insurance scheme for investors who can persuade a jury that there was a misstatement or omission in a proxy statement, even though

the alleged flaw could not have produced the loss complained of. This development runs counter to current state efforts (in Virginia and elsewhere) to contain directors' liabilities and to ensure that corporate decisions are not chilled by the specter of unlimited damages awards. This Court should not allow the implied cause of action under Section 14(a) to be stretched to the point that the traditional requirement of causation is completely eliminated.

There are important practical reasons for this Court to grant review in this case and to resolve the conflict among the circuits. The audience for proxy statements is a national and international one, and if plaintiffs within the Fourth Circuit have a right to recover multi-million dollar damages awards based on allegations such as these, the adverse impact on proxy statements, on corporate transactions, and on directors' willingness to serve on corporate boards will extend throughout the country. Under the liberal venue provisions of the federal securities laws (15 U.S.C. § 78aa), plaintiffs challenging a nationwide proxy solicitation can readily bring suit within the Fourth Circuit, making the legal rules announced in this case potentially applicable to virtually every proxy case. Thus, although other circuits have reached decisions that are inconsistent with the decision below, the sweeping rules that the Fourth Circuit has declared will have a disproportionate nationwide impact that makes it especially important that this Court take action to settle this significant area of law.

I. FEDERAL PROXY LAW REQUIRES DISCLOSURE OF MATERIAL FACTS BUT DOES NOT COMPEL DIRECTORS TO ACCUSE THEMSELVES OF BREACHING THEIR FIDUCIARY DUTY OR TO CHARACTERIZE DISCLOSED FACTS IN A PEJORATIVE MANNER.

The court of appeals predicated liability in this case on two alleged misrepresentations in the proxy statement. It is clear, however, that the court did not question the adequacy of the *facts* that were disclosed. Instead, it held

that petitioners were bound to characterize those facts pejoratively, even to the point of accusing themselves of harboring wrongful subjective motivations in breach of their fiduciary duty. The Fourth Circuit's decision conflicts with this Court's rulings and those of several other circuits that have squarely addressed these recurring legal issues. Unless this erroneous decision is reversed, corporations and directors nationwide will be threatened with immense liabilities for failing to disclose all of the intangible, subjective, and potentially conflicting motivating factors that might have entered their minds, or for failing to characterize disclosed facts in as pejorative a manner as the imagination of plaintiffs' counsel might suggest.

A. The Fourth Circuit's Holding That Directors Have A Duty To Disclose Their Subjective Motivations And Beliefs Is Incorrect And Inconsistent With Decisions Of This Court And Other Circuits.

One of the claims that the Fourth Circuit deemed to be legally sufficient was plaintiff Sandberg's allegation that the proxy statement concealed the directors' true subjective motivations for recommending approval of the merger and falsely stated that they believed the merger price was fair. Sandberg alleged that the directors' "real interest" was in retaining their positions on the Bank's board of directors and that the "Bank's directors were considerably less concerned with the stockholders' interests than with their own." App., *infra*, 15a. Notwithstanding the proxy statement's detailed disclosure of facts relevant to the directors' decision, the court of appeals ruled that its description of the directors' reasons for recommending the merger constituted a material misrepresentation: "the jury was certainly justified in believing that the directors did not believe a merger at $42 per share was in the minority stockholders' interest but, rather, that they voted as they did for other reasons, *e.g.*, retaining their seats on the board." *Ibid.*

The proxy statement contained all of the material facts necessary to permit an investor to evaluate whether the

directors were subject to a potential conflict of interest. The statement described the directors' large stock holdings, their occupations, and their length of service on the board, facts that tended to show the identity of the directors' interests with those of other minority shareholders. App., *infra*, 46a-50a. But the statement also explained that the directors were customers of the Bank, that they expected to continue to transact business with the Bank, and that they would remain on the Bank's board under the plan. *Id.* at 51a, 55a. The court of appeals never questioned the accuracy of these factual representations or identified any facts that were withheld. Instead, it ruled that petitioners had a duty under federal law not only to disclose facts about their relationship to the Bank, but also to speculate about and pejoratively characterize their subjective motivations and beliefs.

This ruling ignores the lesson of *Santa Fe*, which holds that the federal securities laws should not be construed to transform conventional state law actions for breach of fiduciary duty into federal suits. *Santa Fe* makes clear that implied remedies under the securities laws should not be expanded "to bring within [the statute] a wide variety of corporate conduct traditionally left to state regulation. * * * [T]his extension of the federal securities laws would overlap and quite possibly interfere with state corporate law." 430 U.S. at 478-479. These principles would be meaningless if alleged breaches of fiduciary duty could be recycled as securities fraud claims by the simple device of asserting that directors failed to accuse themselves of violating their fiduciary duty.

The rule adopted by the court of appeals in this case squarely conflicts with the legal standard applied in other circuits, which repeatedly have rejected "[e]fforts to dress up [state-law claims] in a § 14(a) suit of clothes [by] * * * including allegations of * * * failure to disclose an alleged ulterior motive." *Field* v. *Trump*, 850 F.2d 938, 947 (2d Cir. 1988); see also *Kas* v. *Financial General Bankshares, Inc.*, 796 F.2d 508, 513 (D.C. Cir. 1986) (*Santa Fe* holds that "failure to disclose * * *

'true' motivations of the directors * * * states no cause of action under the 1934 Act").

The Seventh Circuit's decision in *Kademian* v. *Ladish Co.*, 792 F.2d 614 (7th Cir. 1986), demonstrates just how far the panel in this case departed from the approach taken by other circuits. In *Kademian*, the company had issued a proxy statement listing six reasons why the directors favored the proposed merger. Plaintiffs claimed that these were not in fact the "true reasons," but that the directors favored the merger in order to protect themselves from having their prior wrongdoings exposed. The Seventh Circuit held as a matter of law that these alleged misstatements of the directors' motivations could not constitute actionable misrepresentations, explaining that "a plaintiff may not 'bootstrap' a state law claim into a federal case 'by alleging that the disclosure philosophy of the statute obligates defendants to reveal either the culpability of their activities, or their impure motives for entering the allegedly improper transaction.'" *Id.* at 622, quoting *Panter* v. *Marshall Field & Co.*, 646 F.2d 271, 288 (7th Cir. 1981). Federal securities laws, the court continued, are "not concerned that [defendants] made a statement that, if the plaintiffs were correct, was misleading since it was not the *true* reason management opposed the tender offer." *Kademian*, 792 F.2d at 624.

Other circuits have reached identical conclusions, diametrically opposed to the ruling of the Fourth Circuit in the instant case. See, *e.g.*, *Field*, 850 F.2d at 947; *Kas*, 976 F.2d at 513-515 ("federal securities laws do not impose any requirement that officers and directors or courts engage in public psychoanalysis about the real motives of corporate officers and directors for reaching a decision"); *Alabama Farm Bureau Mutual Casualty Co.* v. *American Fidelity Life Ins. Co.*, 606 F.2d 602, 610 (5th Cir. 1979) (there is no duty to disclose an "individual's motives or subjective beliefs"); *Biesenbach* v. *Guenther*, 588 F.2d 400, 401-402 (3d Cir. 1978) (there is no liability for an allegedly false statement that proposed transactions "were in the best interests of the shareholders and were designed to protect shareholders' financial interests"); *Golub* v. *PPD Corp.*, 576 F.2d 759, 765 (8th Cir. 1978) (federal law does not entitle shareholders to disclosure of the alleged "true motivation of * * * management in selling the assets of the company"). As the Third Circuit has declared: "The securities laws, while their central insistence is upon disclosure, were never intended to attempt any such measures of psychoanalysis or reported self-analysis." *Biesenbach*, 588 F.2d at 402; see also Ratner, "*Federal Corporation Law*" *Before and After Santa Fe Industries v. Green*, in *9th Annual Institute on Securities Regulation* 305, 322 (PLI 1978) ("It is not necessary to say, 'This is a grossly unfair transaction in which the board of directors is overreaching the minority shareholders.' You just have to give them the facts.").

This case provides a concrete example of how a sweeping extension of Section 14(a) can interfere with state corporate law. Concerned about the effects of directors' liability, Virginia, like many other states, amended its corporation laws in 1988 to protect directors in suits questioning their performance of duties and imposed a limit on directors' liability. See Va. Code Ann. § 13.1-692.1. Thus, even if a director were to breach a fiduciary duty, his liability would ordinarily be limited to the greater of $100,000 or his annual compensation from the corporation. *Ibid.*

This provision of Virginia law would limit the minority shareholders' recovery in this case to $2.3 million rather than the more than $13 million that could potentially flow from a successful federal securities law ruling giving what amounts to an appraisal remedy. App., *infra*, 32a-33a. A large number of other states have also modified their corporation laws to protect directors and corporations from the risk of huge liability. See 2 Model Business Corporation Act Annotated 1093 (3d ed. Supp. 1989); Hanks, *Evaluating Recent State Legislation on Director and Officer Liability Limitation and Indemnifica-*

tion, 43 Bus. Law. 1207 (1988). These states' policies would be frustrated and subverted if every claim of undisclosed breach of fiduciary duty exposed directors to unrestricted liability under the federal proxy laws. See *Santa Fe*, 430 U.S. at 479 (refusing to countenance an "extension of the federal securities laws" that "would overlap and quite possibly interfere with state corporate law").

The disadvantage of requiring disclosure of subjective motivations extends well beyond the effects such a rule would have on the relationship between state and federal law. The question of what subjective factors entered into any individual director's decision—much less the decision of an entire board of directors—opens up speculative fact issues that courts are ill-equipped to resolve. See *Data Probe Acquisition Corp.* v. *Datatab, Inc.*, 722 F.2d 1, 5 (2d Cir. 1983) (imposing a duty to disclose subjective motivations "assumes that boards of directors have monolithic viewpoints and threatens to burden the tender offer process with judicial oversight which yields little in the way of useful or new information but subjects tender offers to the delay inherent in judicial dockets"); *Kas*, 796 F.2d at 513 (federal law does not "require a court to probe the business judgment of the directors" in this way). Moreover, it is far from clear that shareholders would benefit from a proxy statement that speculated about all of the subjective and potentially conflicting factors that may have motivated each of the individual board members. See *TSC Industries*, 426 U.S. at 448-449 (warning that excessive exposure to liability will cause management to "bury the shareholders in an avalanche of trivial" and distracting information—"a result that is hardly conducive to informed decisionmaking"). Once the objective material facts, including facts that may suggest a potential conflict of interest, are fully disclosed, no goal of investor protection is served by requiring directors to castigate themselves or to declare—contrary to their own view—that they have acted on selfish motivations.

B. The Fourth Circuit's Holding That Directors Have A Duty To Pejoratively Characterize Facts They Disclose Is Incorrect And Inconsistent With Decisions Of This Court And Other Circuits.

The Fourth Circuit's second basis for liability was the proxy statement's description of KBW as "an independent investment banking firm" that FABI had commissioned "to pass on the fairness of the Merger from a financial point of view." App., *infra*, 16a. There is no dispute that KBW is a prominent investment banking firm specializing in evaluation of bank securities and that it was not affiliated in any way with FABI. The fact that KBW was retained by the majority shareholder and received internal information from it regarding the financial fairness of the merger was explicitly set forth in the proxy statement. App., *infra*, 54a. The proxy statement also fully disclosed the terms of the fee arrangement, which were typical of engagements of this kind: "For rendering its opinion to FABI, [KBW] will be paid $25,000, and if the Merger is consummated, will be paid an additional fee of $75,000". *Id.* at 55a. The court of appeals nonetheless sustained liability based on the use of the adjective "independent" to describe KBW. The court ruled that this word was false and misleading because KBW's fee arrangement created a potential conflict of interest and because KBW had knowledge of FABI's views on the issue of financial fairness. *Id.* at 16a.

The panel's ruling squarely conflicts with a consistent line of cases holding that the proxy laws are concerned with disclosure of material facts, not with characterizations of those facts. See *Golub*, 576 F.2d at 765 (plaintiffs had no right to have the proxy statement characterize the transaction "as plaintiffs would have it characterized"); *Kas*, 796 F.2d at 517 (a proxy statement "need not label or editorialize on the disclosed facts"); *Alabama Farm Bureau*, 606 F.2d at 611 (distinguishing between "characterization" and "fact"); *Goldberg* v. *Meridor*, 567 F.2d 209, 218 n.8 (2d Cir. 1977) (Friendly,

J.) (it is not deceptive for a proxy statement to fail to characterize disclosed facts with "pejorative nouns or adjectives"). The principle behind these decisions is obvious. Once the facts are fairly disclosed, a reasonable person cannot be deceived by the proxy statement's failure to "articulate adverse inferences from or pejorative descriptions of those facts." *Klamberg* v. *Roth*, 473 F. Supp. 544, 552 (S.D.N.Y. 1979).

The First Circuit's decision in *Lessler* v. *Little*, 857 F.2d 866, 875 (1st Cir. 1988), reflects the approach that the courts of appeals generally have taken. There, a shareholder attacked a proxy statement that recommended sale of the company's assets, alleging that the proxy statement was materially false because it described the arrangement as a "bona fide advisory contract rather than as a 'guise' or 'sham' to divert [the company's] assets." The court rejected the plaintiffs' claim as a matter of law, holding that once the relevant facts of the transaction are disclosed, a shareholder has "no grounds under the 1934 Act for complaining about management's choice of words" in describing them. *Id.* at 876; see also *Radol* v. *Thomas*, 534 F. Supp. 1302, 1315 (S.D. Ohio 1982) (description of an investment banking firm as "independent" cannot constitute a material misrepresentation). As Judge Friendly once put it: "Rare indeed is the proxy statement whose language could not be improved upon by a judicial craftsman sitting in the serenity of his chambers." *Kennecott Copper Corp.* v. *Curtiss-Wright Corp.*, 584 F.2d 1195, 1200 (2d Cir. 1978).

The possibility that a corporation and its directors will be exposed to huge liabilities based on the use of the word "independent" to describe a concededly unaffiliated investment banking firm is profoundly disturbing. There can be no doubt that KBW is one of the preeminent independent investment banking firms in the country that specializes in the banking industry (C.A. App. 590-591) and that the terms of its fee arrangement were fully revealed. Given the detailed disclosure of KBW's relationship with

FABI, the use of the adjective "independent" could not "have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *TSC Industries*, 426 U.S. at 449. Yet the Fourth Circuit held that use of the word "independent" was enough to sustain millions of dollars in liability and the stigma of having been found to have violated the federal securities laws. This Court should not close its eyes to the chilling effect that imposing liability over word choices like this will have on the willingness of civic, community and business leaders to serve on corporate boards. "Were such a rule applied, no [director] of character and responsibility would be found willing to accept such places." *Briggs* v. *Spaulding*, 141 U.S. 132, 149 (1891).

II. AN IMPLIED CAUSE OF ACTION FOR DAMAGES UNDER FEDERAL PROXY LAW REQUIRES PROOF OF TRANSACTION AND LOSS CAUSATION.

In *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 385 n.7 (1970), this Court explicitly left open the question whether causation in a Section 14(a) case "could be shown where the management controls a sufficient number of shares to approve the transaction without any votes from the minority." This case presents the Court with an opportunity to resolve that open issue, and to reaffirm that an implied cause of action under Section 14(a) is not an insurance scheme for disgruntled investors who would prefer to receive a higher premium for their shares.

The Fourth Circuit's elimination of the requirement of causation from the implied cause of action under Section 14(a) is a stark departure from the traditional requirement of a causal link between the wrong alleged and the damages awarded. The court held that millions of dollars in damages may be recovered if the proxy statement "contained material misrepresentations and was an essential link in the merger" (App., *infra*, 14a). The court reached that conclusion even though it acknowledged that the com-

bined vote of the minority shareholders could not block the merger transaction (*id.* at 12a) and even though the minority shareholders, armed with allegations of breach of fiduciary duty, attempted—but were totally unable—to block the merger or secure an appraisal remedy in state court (*id.* at 31a-33a). In these circumstances, it simply cannot be said that the two allegedly misleading assertions in the proxy statement *caused* either the merger transaction or the loss of $18 per share that the Fourth Circuit deemed to be plaintiffs' recoverable damages.

A. Recovery Under Section 14(a) Is Limited To Shareholders Who Are Injured By Distortion Of The Voting Process.

The purpose of Section 14(a) is "to prevent management or others *from obtaining authorization* for corporate action by means of deceptive or inadequate disclosure in proxy solicitation." *J.I. Case Co.* v. *Borak*, 377 U.S. 426, 431 (1964) (emphasis added). Of course, it is often difficult to prove whether a proxy statement actually influenced enough votes to affect the outcome of the vote. Hence, this Court in *Mills* announced a presumption: if a shareholder can show that a proxy statement contains a material misstatement or omission it is generally presumed that the misstatement or omission affected the outcome of the vote. See *Mills*, 396 U.S. at 384-385. This approach is logical, inasmuch as the concept of materiality is itself defined by reference to what a reasonable shareholder would deem important in deciding how to vote. See *TSC Industries*, 426 U.S. at 449.

When the Court declared these principles, however, it recognized that there is one common situation in which this presumption does not logically apply. In what has since become famous to securities law specialists as "*Mills* footnote 7," the Court explained that it "need not decide in this case whether causation could be shown where the management controls a sufficient number of shares to approve the transaction without any votes from the minority." *Mills*, 396 U.S. at 385 n.7. The Court proceeded to provide a list of lower court decisions and academic commentaries that had disagreed on whether and how causation could be established in such a situation.

Since this Court's decision in *Mills*, the Second Circuit and a number of district courts have held that power to vote down a proposed merger is not necessary to a claim for damages under Section 14(a). See, *e.g.*, *Schlick* v. *Penn-Dixie Cement Corp.*, 507 F.2d 374, 382-383 (2d Cir. 1974); *Smillie* v. *Park Chemical Co.*, 466 F. Supp. 572, 577 (E.D. Mich. 1979); but see *Swanson* v. *American Consumers Industries*, 475 F.2d 516, 518 n.2 (7th Cir. 1973) (questioning this approach). Courts following the *Schlick* approach have suggested that even when it is clear that the proxy statement could have had no impact on the outcome of the vote, minority shareholders may still be able to establish causation by showing that an accurate proxy statement would have provided them with information necessary to enjoin the transaction in state court. See *Schlick*, 507 F.2d at 382-384; see generally Gelb, *Rule 10b-5 and Santa Fe—Herein of Sue Facts, Shame Facts, and Other Matters*, 87 W. Va. L. Rev. 189 (1985).

This rationale conflicts with the purposes of Section 14(a) and allows recovery of damages that are absolutely unrelated to the purported violation of the proxy laws. The purpose of Section 14(a) is to *protect the voting process*—not to create an adjunct discovery system to facilitate lawsuits in state court. Thus, if an alleged violation of Section 14(a) could not have affected the voting process, a private plaintiff should not be accorded an implied right of action under Section 14(a) simply to provide ammunition for a state court lawsuit.

This Court has followed that approach in closely-related contexts. In *Piper* v. *Chris-Craft Industries*, 430 U.S. 1, 26-41 (1977), for example, it stressed the need to identify the precise interests Congress sought to protect in order to determine how broadly courts should extend an implied

cause of action under the securities laws. Because the focus of the Williams Act was the protection of investors confronted with tender offers, and not protection of unsuccessful tender offerors who might be injured by Section 14(e) violations, the Court held in *Piper* that recognizing a private cause of action for tender offerors was not "necessary to effectuate Congress' goals." *Id.* at 26. So, too, with respect to Section 14(a): Congress's interest was protecting shareholders' votes, and injuries unrelated to voting are unrelated to the goals of the statute. Certainly it cannot be said that extending Section 14(a) to non-voting injuries is "necessary to effectuate Congress's goals." *Piper*, 430 U.S. at 26; *Santa Fe*, 430 U.S. at 477-480.

When the Second Circuit announced its contrary position in *Schlick*, this Court had not yet begun to stress the serious federalism concerns occasioned by expansive judicial creation of implied causes of action under the federal securities laws. As one commentator recently observed: "It is highly questionable whether [*Schlick* and the cases following it] are consistent with the Supreme Court's concern of freeing the federal courts from claims that are based on state law and breaches of fiduciary duties." T. Hazen, *Treatise on the Law of Securities Regulation* 670 (2d ed. 1990). In light of these general concerns and the serious questions about the implied private cause of action under Section 14(a) in particular,[6] review is

[6] A number of Justices have questioned the correctness, as an original matter, of *J.I. Case Co.* v. *Borak*, 377 U.S. 426 (1964), which recognized an implied private cause of action under Section 14(a). See, *e.g.*, *Carlson* v. *Green*, 446 U.S. 14, 39-40 n.5 (1980) (Rehnquist, J., dissenting) ("In light of this Court's recent decisions * * * it is clear that there is nothing left of the rationale of *Borak*"); *Cannon* v. *University of Chicago*, 441 U.S. 677, 735-736 (1979) (Powell, J., dissenting) ("I find [*Borak*] both unprecedented and incomprehensible as a matter of public policy. * * * [It] constitutes a singular and, I believe, aberrant interpretation of a federal regulatory statute"). Cf. *Thompson* v. *Thompson*, 484 U.S. 174, 190 (1988) (Scalia, J., concurring in the judgment) ("this Court has long since abandoned its hospitable attitude towards implied rights of action. In the 23 years since * * * [*Borak*] we have *twice* narrowed the test for implying a private right"); *id.* at 188 (O'Connor, J., concurring) (same). Whether or not the Court is inclined to overrule *Borak*, these concerns counsel strongly against extending it even further than it has already been extended. See *Shearson/American Express Inc.* v. *McMahon*, 482 U.S. 220, 234 (1987) ("While *stare decisis* concerns may counsel against upsetting [*Wilko* v. *Swan*'s contrary conclusion * * * we refuse to extend *Wilko*'s reasoning * * *").

needed in this case to prevent the implied cause of action from extending to extraneous injuries unrelated to shareholder voting.

B. Even If Non-Voting Injuries Are Cognizable Under Section 14(a), Actual Causation Must Still Be Proved.

Even if the implied cause of action under Section 14(a) is broad enough to encompass non-voting injuries, the Fourth Circuit's application of *Schlick* rests on hypotheses of causation that are far too attenuated and speculative to support liability. See *Swanson*, 475 F.2d at 518 n.2 (7th Cir. 1973) (questioning whether the "orthodox standard of causation in tort law should be cast aside entirely," as it would have to be to allow recovery on speculative non-voting theories of causation); see generally *Piper*, 430 U.S. at 52 (Blackmun, J., concurring) ("even if one presumes that the shareholders [would have taken action] if they had known the truth, there is still no way of knowing what course the contest would have taken from that point onward").

The traditional "materiality" inquiry, which serves as a surrogate for causation in some proxy cases, has no logical relation to causation in a case such as this one. A misstatement or omission is deemed "material" under the *TSC* standard because of its potential to alter the outcome of the vote, but that says nothing about its impact in a non-voting context. As the Seventh Circuit has explained:

> While a determination that a misstatement or omission in a proxy statement is material "indubitably

> embodies a conclusion that the defect was of such a character that it might have been considered important by a reasonable shareholder who was in the process of deciding how to vote" (*Mills*, [396 U.S. at 384]), it hardly embodies a conclusion that the non-controlling minority might have somehow, apart from their voting power, prevented the merger from taking place on the terms proposed.

Swanson, 475 F.2d at 518 n.2. It is obvious that if non-voting causation is to be recognized at all in the Section 14(a) context the causation inquiry cannot focus, as it does in voting cases, on what a reasonable investor would consider important in deciding how to vote. It is equally obvious that "the causal connection" must be deemed "broken" by "[a]ny showing that severs the link between the alleged misrepresentation and * * * the price received * * * by the plaintiff." *Basic Inc.* v. *Levinson*, 485 U.S. 224, 248 (1988).

This Court's decision in *Santa Fe*—which was handed down three years after *Schlick*—makes clear that speculative causation claims are not sufficient in this context. In *Santa Fe*, minority shareholders complained not only of unfairness in a so-called "freeze-out" merger, but also of failure to disclose material facts regarding the merger plan. They alleged that their injury was caused by "the majority stockholder's failure to give the minority [shareholders] advance notice of the merger." 430 U.S. at 474 n.14. This Court rejected that claim as a matter of law, refusing to speculate about how the information at issue might have assisted the minority shareholders (*ibid.*):

> [R]espondents do not indicate how they might have acted differently had they had prior notice of the merger. Indeed, they accept the conclusion of both courts below that under Delaware law they could not have enjoined the merger because an appraisal proceeding is their sole remedy in the Delaware courts for any alleged unfairness in the terms of the merger. Thus, the failure to give advance notice was not [actionable under] the statute or the Rule.

Moreover, even if the speculative causation theories referred to in *Schlick* did somehow survive *Santa Fe*, the Fourth Circuit's ruling in this case could not stand. It goes far beyond the reasoning of *Schlick* or any other decision by sustaining liability even though plaintiff Sandberg made no showing whatsoever that the misstatements she complained of could have had any impact on her ability to prevent the merger. In fact, a group of the Bank's minority shareholders, armed with allegations of breach of fiduciary duty (derived largely from facts disclosed in the proxy statement), was wholly unsuccessful in its efforts to enjoin the merger in state court. See pp. 5-6, *supra*. Neither *Schlick* nor any other case before this one reads proof of causation entirely out of the private cause of action.[7]

As the Second Circuit held ten years after its decision in *Schlick*, to prevail in non-voting cases plaintiffs must demonstrate "that they would have succeeded" in preventing the merger "if they had been advised of the truth and had pursued [their available] remedies." *Madison Consultants* v. *FDIC*, 710 F.2d 57, 64 (2d Cir. 1983). Although the circuits have disagreed about the precise nature of this showing, most of them require distinct, non-speculative proof that the merger plan would have been blocked by the disclosure at issue. See *Kidwell ex rel. Penfold* v. *Meikle*, 597 F.2d 1273, 1294 (9th Cir. 1979) (the plaintiff must show that he would have actually succeeded in securing relief in state court); *Healey* v. *Catalyst Recovery of Pennsylvania, Inc.*, 616 F.2d 641, 647 (3d Cir. 1980) (the plaintiff must show a reasonable probability of success in state court); *Alabama Farm Bureau*, 606 F.2d at 614 (the plaintiff must show that

---

[7] Although *Schlick* spoke of the opportunity to establish that an accurate proxy statement would have allowed the plaintiff to obtain relief in state court, it cautioned that "[c]ausality, we think is sufficiently pleaded; *the proof may, of course, be something else.*" 507 F.2d at 383 (emphasis supplied). That proof was wholly absent here.

he could make out a prima facie case for relief in state court).[8]

In this case, the lower courts never asked any of these questions because they misread *Schlick* as dispensing totally with the element of causation. App., *infra*, 13a-14a. The effect of that manifest error here was to expose petitioners to millions of dollars in liability even though plaintiffs never showed—and could not show—that the supposedly misleading proxy statement caused them any injury or affected their rights in any way. It is evident that the lower courts in this case have totally overlooked the need to establish how the challenged errors in the proxy statement *caused* the amount of damages claimed.[9] In so doing, they have disregarded the precept that "any extension of [the federal securities] laws, to approach something closer to an investor insurance scheme, should come from Congress, and not from the courts." *Basic Inc.*, 485 U.S. at 256-257 (White and O'Connor, JJ., concurring in part and dissenting in part).

By undertaking review of the causation question, this Court will be able (1) to decide whether theories of nonvoting causation are ever cognizable under Section 14(a), and (2) if so, to define the appropriate standard of proof. These issues have been the subject of frequent disagreement and uncertainty in the lower courts following this Court's decision in *Santa Fe*. In view of the substantial volume of litigation that *Santa Fe*'s causation ruling has engendered, one commentator has remarked

[8] Although these cases have arisen under Rule 10b-5, the *Santa Fe* causation analysis extends to Section 14(a) as well. See L. Loss, *Fundamentals of Securities Regulation* 809 (1988) (discussing cases); R. Jennings & H. Marsh, *Securities Regulation* 1287 (6th ed. 1987) (the standard of causation under Section 14(a) is certainly as strict as under Rule 10b-5).

[9] The securities laws embody "the standard rule of tort law that the plaintiff must allege and prove that, but for the defendant's wrongdoing, the plaintiff would not have incurred the harm of which he complains." *Bastian* v. *Petren Resources Corp.*, 892 F.2d 680, 685 (7th Cir. 1990) (Posner, J.).

that "[o]ne would hope * * * that such an important issue [will] be fully considered" by the Supreme Court. 3B H. Bloomenthal, *Securities and Federal Corporate Law* § 11.20[3] at 11-118 (rev. ed. 1989).[10] This case presents the Court with an excellent opportunity not only to clarify this important area of securities law, but to reverse the clearly erroneous decision that the Fourth Circuit has rendered on these issues.

III. A REVIEWING COURT MAY NOT UPHOLD A GENERAL JURY VERDICT THAT MIGHT HAVE BEEN BASED ON AN INVALID THEORY OF LIABILITY.

The trial court allowed the jury in *Sandberg* to consider six alleged misrepresentations in the proxy statement. Because the jury's verdict may have rested on any one of those allegations, there is no way to determine which allegation the jury actually relied upon in awarding damages. Nonetheless, the court of appeals considered it unnecessary to decide whether all or even most of the six allegations were supportable. The court declared that "the submission of both correct and incorrect factual bases supporting a single theory of recovery is not grounds for reversal of a judgment on a general verdict." App., *infra*, 17a. The court contrasted these "factual bases" with the submission of incorrect legal theories, which it acknowledged would require reversal. The Fourth Circuit's ruling is directly contrary to this Court's precedents and exacerbates a significant split among the circuits.

In reviewing general verdicts, this Court has never recognized a distinction between defective legal theories and inadequate "factual bases." In *Wilmington Star Mining Co.* v. *Fulton*, 205 U.S. 60, 78-79 (1907), the Court ruled that there was insufficient evidence to support one of the eight factual claims that had been sub-

[10] For a list of scholarly efforts to grapple with this aspect of *Santa Fe* and the many cases interpreting it, see R. Jennings & H. Marsh, *Securities Regulation* 1091-1092 (6th ed. 1987) (listing 17 articles on the subject).

mitted to the jury. *Id.* at 77-78. "Under this condition of things," the Court found "it impossible to say that prejudicial error did not result." *Id.* at 78. In a holding that directly governs this case, the Court declared that a jury verdict cannot be sustained

> where a jury is wrongfully permitted over the objection of the opposing party to take into consideration in reaching a verdict counts of a declaration which have not been supported by any evidence, and where it is impossible from the record to say upon which of the counts of the declaration the verdict was based.

Id. at 79. This Court has reaffirmed that principle on a number of occasions. See, *e.g.*, *Sunkist Growers, Inc.* v. *Winckler & Smith Co.*, 370 U.S. 19, 29-30 (1962); *United Pilots Ass'n* v. *Halecki*, 358 U.S. 613, 618-619 (1959).

Given these binding precedents, it is difficult to understand how the Fourth Circuit reached the decision that it did, although its approach finds support among a few other circuits. See, *e.g.*, *Culli* v. *Marathon Petroleum Co.*, 862 F.2d 119, 123 (7th Cir. 1988). The majority of circuits have, consistent with this Court's holdings, taken the opposite position. These courts have held that a jury's general verdict may not be sustained unless the reviewing court is confident that the jury rested the verdict on a set of facts that can support liability. See *McMurray* v. *Deere & Co.*, 858 F.2d 1436, 1444 (10th Cir. 1988); *Dudley* v. *Dittmer*, 795 F.2d 669, 672-673 (8th Cir. 1986); *Syufy Enterprises* v. *American Multicinema, Inc.*, 793 F.2d 990, 1001 (9th Cir. 1986); *Murphy* v. *United States*, 653 F.2d 637, 646 (D.C. Cir. 1981); *Brochu* v. *Ortho Pharmaceutical Corp.*, 642 F.2d 652, 662 (1st Cir. 1981); *Yentsch* v. *Texaco, Inc.*, 630 F.2d 46, 59 (2d Cir. 1980); *Avins* v. *White*, 627 F.2d 637, 646 (3d Cir. 1980); *Smith* v. *Southern Airways, Inc.*, 556 F.2d 1347, 1347-1348 (5th Cir. 1977).

Beyond this, the present case falls on the legal side of the factual/legal dichotomy the Fourth Circuit hypothesized.

Petitioners did not limit their challenge to respondents' case to its factual deficiencies. They also contended (App., *infra*, 14a-17a) that the statements were "immaterial as a matter of law."[11] Lack of materiality may, depending on the context, be a pure question of law or a "mixed question of law and fact," *TSC Industries*, 426 U.S. at 450. It is not, in any event, the kind of pure factual deficiency that a court can presume a jury would have understood. The materiality inquiry is a sophisticated legal analysis that implicates issues of statutory policy and federalism. To simply assume that the jury would not have relied on legally immaterial counts deprived petitioners of their right to meaningful appellate review of the jury's verdict.[12]

The Fourth Circuit's affirmance of the general verdict threatens a serious miscarriage of justice. In this case the jury's verdict of $43,956 has already been parlayed into $3.3 million through invocation of nonmutual offen-

---

[11] These arguments were made repeatedly throughout the proceedings. See C.A. 944-945 (motion for directed verdict); Brief in Support of Defendants Virginia Bankshares, Inc.'s, and First American Bankshares, Inc.'s Motion for Summary Judgment at 30-47.

[12] There is no basis for the Fourth Circuit's extraordinary suggestion (App., *infra*, 17a-18a) that petitioners waived this claim by acquiescence in an instruction. The instruction in question stated only that the plaintiff "must prove by a preponderance of the evidence that the defendants made *one or more* of the misrepresentations of fact as alleged or omitted to state facts which would be necessary to make other statements by the defendants not misleading to the plaintiff." *Ibid.* There was nothing wrong with this instruction, because, assuming petitioners could be liable at all, that liability need rest on only one factually and legally supportable ground. But this instruction has nothing to do with the question of *the court's* duty to ensure that the verdict rests on a supportable basis. In the J.N.O.V. hearing, counsel for the corporate defendants clearly argued that "if only one of the six violations doesn't pass muster, it should not have been sent to the jury. There would have to be a new trial as well, for the simple reason that we have no way of knowing why the jury found under the 14(a) counts." C.A. App. 1336.

sive collateral estoppel. Petitioners are threatened with a further enlargement of that judgment as a result of the Fourth Circuit's class action ruling. Extension of the damages award to the entire class of minority shareholders would create a judgment nearly 300 times larger than the damages award rendered by the jury. This sweeping use of offensive collateral estoppel would be dubious in its own right, even if it were clear that the jury reached a verdict that is legally sustainable. It is surely intolerable when there is no way of determining whether the jury ever found petitioners liable on any sustainable allegation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

JOHN S. STUMP
McGuire, Woods, Battle & Boothe
8280 Greensboro Drive
Post Office Box 9346
McLean, Virginia 22102

LEWIS T. BOOKER
Hunton & Williams
707 East Main Street
Post Office Box 1535
Richmond, Virginia 23212

STEPHEN M. SHAPIRO
Counsel of Record
ANDREW L. FREY
KENNETH S. GELLER
LAWRENCE C. MARSHALL
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 463-2000

Counsel for Petitioners

MARCH 1990

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

Nos. 88-2658 to 88-2660, 88-2662 to
88-2664, 89-2903, 89-2904

DORIS I. SANDBERG, individually and on
behalf of other minority stockholders,
Plaintiff-Appellant,

v.

VIRGINIA BANKSHARES, INC.; FIRST AMERICAN BANKSHARES, INC.; JACK W. BEDDOW; MILTON L. DREWER, JR.; E. GUY RIDGELY; EMANUEL A. BAKER, JR.; HARRIET F. BRADLEY; JOEL T. BROYHILL; THOMAS B. CHAMBERLIN; THOMAS P. CHISMAN; SIDNEY O. DEWBERRY; ERIC W. ERDOSSY; GEORGE W. JOHNSON; CHARLES T. LINDSAY, JR.; DONALD R. MAXFIELD; LINDA H. MICHAEL; MILTON V. PETERSON; GLENN W. SAUNDERS, JR.; CHARLES H. SMITH, JR.; VERLIN W. SMITH; HENRY A. THOMAS; STEPHEN G. YEONAS,
Defendants-Appellees,

THOMAS G. MAYS; DWIGHT C. SCHAR,
Defendants. (Two Cases)

DORIS I. SANDBERG, individually and on
behalf of other minority stockholders,
Plaintiff-Appellee,

v.

JACK W. BEDDOW; MILTON L. DREWER, JR.; E. GUY RIDGELY; EMANUEL A. BAKER, JR.; HARRIET F. BRADLEY; JOEL T. BROYHILL; THOMAS B. CHAMBERLIN;

THOMAS P. CHISMAN; SIDNEY O. DEWBERRY; ERIC W. ERDOSSY; GEORGE W. JOHNSON; CHARLES T. LINDSAY, JR.; DONALD R. MAXFIELD; LINDA H. MICHAEL; MILTON V. PETERSON; GLENN W. SAUNDERS, JR.; CHARLES H. SMITH, JR.; VERLIN W. SMITH; HENRY A. THOMAS; STEPHEN G. YEONAS,

Defendants-Appellants,

and

VIRGINIA BANKSHARES, INC.;
FIRST AMERICAN BANKSHARES, INC.;
THOMAS G. MAYS; DWIGHT C. SCHAR,

Defendants.

DORIS I. SANDBERG, individually and on behalf of other minority stockholders,

Plaintiff-Appellee,

v.

VIRGINIA BANKSHARES, INC.;
FIRST AMERICAN BANKSHARES, INC.,

Defendants-Appellants,

and

JACK W. BEDDOW; MILTON L. DREWER, JR.; E. GUY RIDGELY; EMANUEL A. BAKER, JR.; HARRIET F. BRADLEY; JOEL T. BROYHILL; THOMAS B. CHAMBERLIN; THOMAS P. CHISMAN; SIDNEY O. DEWBERRY; ERIC W. ERDOSSY; GEORGE W. JOHNSON; CHARLES T. LINDSAY, JR.; DONALD R. MAXFIELD; THOMAS G. MAYS; LINDA H. MICHAEL; MILTON V. PETERSON; GLENN W. SAUNDERS, JR.; DWIGHT C. SCHAR; CHARLES H. SMITH, JR.; VERLIN W. SMITH; HENRY A. THOMAS; STEPHEN G. YEONAS,

Defendants.

PAUL H. WEINSTEIN, *et al.*,

Plaintiffs-Appellees,

v.

JACK W. BEDDOW; MILTON L. DREWER, JR.; E. GUY RIDGELY; EMANUEL A. BAKER, JR.; HARRIET F. BRADLEY; JOEL T. BROYHILL; THOMAS B. CHAMBERLIN; THOMAS P. CHISMAN; SIDNEY O. DEWBERRY; ERIC W. ERDOSSY; GEORGE W. JOHNSON; CHARLES T. LINDSAY, JR.; DONALD R. MAXFIELD; LINDA H. MICHAEL; MILTON V. PETERSON; GLENN W. SAUNDERS, JR.; CHARLES H. SMITH, JR.; VERLIN W. SMITH; HENRY A. THOMAS; STEPHEN G. YEONAS,

Defendants-Appellants,

and

VIRGINIA BANKSHARES, INC.;
FIRST AMERICAN BANKSHARES, INC.,

Defendants.

PAUL H. WEINSTEIN, *et al.*,

Plaintiffs-Appellees,

v.

VIRGINIA BANKSHARES, INC.;
FIRST AMERICAN BANKSHARES, INC.,

Defendants-Appellants,

and

JACK W. BEDDOW; MILTON L. DREWER, JR.; E. GUY RIDGELY; EMANUEL A. BAKER, JR.; HARRIET F. BRADLEY; JOEL T. BROYHILL; THOMAS B. CHAMBERLIN; THOMAS P. CHISMAN; SIDNEY O. DEWBERRY; ERIC W. ERDOSSY; GEORGE W. JOHNSON; CHARLES T. LINDSAY, JR.; DONALD R. MAXFIELD; LINDA H. MICHAEL; MILTON V. PETERSON; GLENN W. SAUNDERS, JR.; CHARLES H. SMITH, JR.; VERLIN W. SMITH; HENRY A. THOMAS; STEPHEN G. YEONAS,

Defendants.

PAUL H. WEINSTEIN, *et al.*,
Plaintiffs-Appellants,

v.

VIRGINIA BANKSHARES, INC.; FIRST AMERICAN BANKSHARES, INC.; JACK W. BEDDOW; MILTON L. DREWER, JR.; E. GUY RIDGELY; EMANUEL A. BAKER, JR.; HARRIET F. BRADLEY; JOEL T. BROYHILL; THOMAS B. CHAMBERLIN; THOMAS P. CHISMAN; SIDNEY O. DEWBERRY; ERIC W. ERDOSSY; GEORGE W. JOHNSON; CHARLES T. LINDSAY, JR.; DONALD R. MAXFIELD; LINDA H. MICHAEL; MILTON V. PETERSON; GLENN W. SAUNDERS, JR.; CHARLES H. SMITH, JR.; VERLIN W. SMITH; HENRY A. THOMAS; STEPHEN G. YEONAS,
Defendants-Appellees (Two Cases).

Argued June 7, 1989

Decided Dec. 15, 1989

Before HALL, Circuit Judge, GORDON, Senior United States District Judge for the Middle District of North Carolina, sitting by designation, and VOORHEES, United States District Judge for the Western District of North Carolina, sitting by designation.

K.K. HALL, Circuit Judge:

First American Bankshares, Inc. ("FABI"), its wholly-owned subsidiary, Virginia Bankshares, Inc. ("VBI" and, collectively with FABI, "Bankshares"), First American Bank of Virginia ("Bank"), and various directors of the Bank, were defendants below in each of these two cases. In *Sandberg*, they appeal from the judgment entered on a jury verdict for the plaintiff, Doris Sandberg, based on

federal securities law violations and state law breach of fiduciary duties. In *Weinstein II*, they appeal from a summary judgment entered on the basis of the *Sandberg* judgment on behalf of sixteen plaintiffs. Sandberg cross-appeals from the denial of her motion for class certification, and the *Weinstein II* plaintiffs cross-appeal from the district court's imposition of a cap on the maximum liability of the individual Bank directors on the state law claims. Both Sandberg and the *Weinstein II* plaintiffs cross-appeal from the denial of attorneys' fees in their respective actions. Finding no error in the trial of the *Sandberg* action, we affirm that judgment; however, we find that the lower court erred in denying class certification, and remand for entry of an appropriate order. In light of our rulings, we remand for reconsideration of the denial of attorneys' fees in *Sandberg*. We find no error in the grant of summary judgment to the *Weinstein II* plaintiffs, in the denial of attorneys' fees or in the imposition of a cap on each director's liability and, accordingly, we affirm.

I. FACTS

These cases arise from FABI's decision to seek a merger of the Bank with VBI through the purchase by VBI of the 15% of the Bank stock owned by the minority stockholders. Although VBI's ownership of 85% of the Bank's stock was sufficient for approval of the merger, Virginia law required the Bank's directors to issue a proxy statement recommending the plan of merger and to call a stockholders' meeting to vote on the merger. Va.Code Ann. § 13.1-718(B)(1) (1989). The activities of Bankshares and the Bank's directors surrounding this merger, particularly the issuance of the proxy statement, form the basis of the damage actions brought by various minority stockholders.

FABI retained an investment advisor, Keefe, Bruyette and Woods [KBW] to furnish an opinion regarding a "fair price" to pay for the minority-held shares. KBW

submitted its opinion that $42 per share was fair. Through arrangements made by Jack Beddow, an officer of both FABI and the Bank, KBW made a presentation to a small group of the Bank's directors and stockholders on January 29, 1987. On the same day, the Bank's executive committee members present at this presentation drafted a two-sentence statement recommending that the board of directors accept FABI's tender offer of $42 per share. At the board meeting held on February 12, 1987, the Bank's directors voted to approve the merger and to recommend to the minority stockholders that they accept the $42 per share offer. No independent investment advisor was retained by the Bank to determine a fair value for the minority-held stock.

A proxy statement was prepared and sent to each stockholder. At the April 21, 1987, stockholders' meeting, the merger proposal garnered 85% of the minority stockholders' votes. On May 27, 1987, the merger was consummated and the minority-held stock was converted to a right to receive $42 per share.

One week prior to the April 21, 1987, stockholders' meeting, Paul Weinstein and twelve other minority stockholders filed suit in Virginia state court to enjoin defendants from effecting the proposed merger and to enjoin any merger which did not provide a "fair price per share" to the minority stockholders. (*Weinstein I*). This request was denied. The complaint was then amended to add three plaintiffs and to include a claim for damages against VBI and the Bank's directors for breach of state law fiduciary duties. This amended complaint prayed for an equitable appraisal pursuant to Va.Code Ann. § 13.1-730 (1989). By order dated October 16, 1987, the amended complaint was dismissed, and the *Weinstein I* plaintiffs' appeal of this order to the Supreme Court of Virginia was pending when the *Sandberg* and *Weinstein II* judgments were entered.

A. *Sandberg*

After the merger, Doris Sandberg, a Bank stockholder who owned 2,442 shares, filed a class action in federal district court claiming violations of federal securities laws and breach of fiduciary duties imposed by state law. Her complaint described the putative plaintiff class as "all former shareholders of [the Bank], excluding defendants" which she alleged to consist of approximately 2,017 persons. Named as defendants were FABI, VBI, and individual directors of the bank. The crux of Sandberg's complaint was that the Bank's proxy solicitation contained material misrepresentations and omitted important facts. More particularly, she alleged that Bankshares orchestrated the entire merger and, abetted by an unquestioning and compliant Bank board of directors, led the minority shareholders to believe that $42 per share was a reasonable price when in fact the stock was worth substantially more.

Class certification was denied and the case proceeded to trial. The jury found that the shares were worth an additional $18 each and awarded Sandberg $43,956 on each claim; judgment was entered upon the verdict for this amount. The judgment is against all defendants, jointly and severally, on Count I (federal securities law); an "alternative" judgment was entered against only the Bank's directors on Count II (state fiduciary duties). Sandberg's motion for attorneys' fees was denied. Each defendant appeals from the judgment, and Sandberg cross-appeals from the denial of class certification and the denial of attorneys' fees.

B. *Weinstein II*

In August 1988, Paul Weinstein and sixty-eight other minority stockholders filed suit in the federal district court for the District of Columbia. This action was transferred to the court in which *Sandberg* was pending and the complaint was amended to mirror the *Sandberg* com-

plaint. After the judgment was rendered in *Sandberg*, the *Weinstein II* plaintiffs invoked the doctrine of offensive collateral estoppel and moved for summary judgment. The district court granted the motion and entered judgment for the plaintiffs in an amount calculated on the basis of an additional $18 for each share of Bank stock owned by the plaintiffs at the time of the merger (total: $3,292,236). Pursuant to Va.Code Ann. § 13.1-692.1 (1989), the trial court imposed a cap on the individual liability of each Bank director on the judgment on the state law claim. The defendants appeal from the judgment, and the *Weinstein II* plaintiffs cross-appeal from the imposition of the liability caps as well as from the denial of attorneys' fees. We first address the issues raised by the appeals in *Sandberg*.

II. CLASS CERTIFICATION

The putative class in *Sandberg* was alleged to consist of all non-defendant stockholders. In a bench ruling, the district court denied Sandberg's motion for class certification on the following grounds: (1) since Sandberg voted against the merger, she was not typical of the class (less than 15% of the minority shareholders voted against the merger); (2) the sixteen plaintiffs in *Weinstein I* could not be members of the class; (3) a conflict of interest existed in that Sandberg's law firm had previously represented one of the defendant directors; and (4) other stockholders had shown little interest in the suit. Bankshares also contends that class certification was properly denied because individual questions predominated over common ones. Sandberg contends that she was an adequate representative of the class, and that the other prerequisites of certification were met. We hold that the district court erred in denying certification of a class consisting of all minority stockholders. *See generally In re A.H. Robins Co., Inc.*, 880 F.2d 709 (4th Cir.1989) (trend is to give Rule 23 a liberal construction).

Fed.R.Civ.P. 23(a)(4) requires that the class representative be capable of fairly and adequately representing the interests of the class. The primary reason given by the district court for its denial of certification was the fact that Sandberg, unlike most of the minority stockholders, voted against the merger and thus obviously did not rely on the alleged material misrepresentations in the proxy statement. As discussed below in Part III, however, her lack of reliance has no bearing on the determination of liability on Sandberg's claims. Inasmuch as reliance is not a factor, it cannot be said that Sandberg's vote against the merger acted to make her interests antagonistic to the other minority stockholders. Indeed, it is difficult to imagine why any stockholder would not immediately embrace Sandberg's representation of their interests and the opportunity to receive more money for his Bank shares. In basing its denial of certification on this ground, the lower court erred as a matter of law.

The potential conflict arising out of the prior representation of a defendant-director also implicates the Rule 23 requirement of an adequate representative. Sandberg's law firm had previously represented director Dwight Schar in some personal legal matters, but Schar was voluntarily dismissed soon after the complaint was filed. On appeal, Sandberg asserts that Schar and another defendant director were dropped as parties because neither had attended the two Bank board meetings at which the VBI merger had been discussed and voted upon. Bankshares responds that Sandberg knew of such defenses prior to filing the complaint but dismissed Schar only after realizing the possible conflict. Regardless of the true motivation, the fact remains that Schar had been dismissed as a party prior to the certification motion and that his nonattendance at the critical board meetings arguably constituted a complete defense to both the federal and state claims. We are unable to see how Sandberg's representation was in any way compromised by this alleged conflict.

The lower court's reliance on this basis was an abuse of discretion.

The fact that sixteen stockholders were simultaneously pursuing state court remedies also does not constitute an adequate ground for denial of certification. The lower court stated that inclusion of the sixteen "could cause considerable difficulty with them being a part of the class action . . . [if they] ultimately could not be members of the class." If this had been the only apparent impediment, the preferable solution would have been to define the *Sandberg* class as consisting of all minority stockholders except the sixteen who were litigating in state courts. These sixteen stockholders could then have been placed in a subclass pending resolution of their state court action. We believe that denial of certification was clearly inimical to the purposes for which the class action procedure was intended. Faced with a putative class of approximately 2,000 minority stockholders, it was an abuse of discretion to deny certification on the ground that sixteen members might be eventually barred from relief by *res judicata*.

The lower court also based its decision on a lack of interest by other stockholders in the *Sandberg* action. No basis for this finding is given, and we are unable to discern how this lack of interest may have manifested itself. Moreover, even assuming such a lack of interest, we are unable to find legal significance in it. We believe that the court abused its discretion in relying on this factor to deny class certification.

Unlike the situation in *Zimmerman v. Bell*, 800 F.2d 386 (4th Cir.1986), there were no individual questions of law or fact to predominate over the common ones. In fact, the only questions presented with regard to the federal law claim were (1) did the proxy statement contain a material misrepresentation or omit a material fact, (2) if so, was the proxy statement an "essential link" in the merger, and (3) if so, what were the damages suffered; the state law claim involved only the question of whether the

directors acted in good faith. Only a single proxy statement was involved, and damages were determinable on the basis of the value of a share of stock, so the only individual questions were how many shares of stock each shareholder owned. The defendants' contention that individual questions predominated is without any basis whatsoever. *Pellman v. Cinerama, Inc.*, 89 F.R.D. 386, 289 (S.D.N.Y. 1981).

The lower court's denial of certification was based on the clearly erroneous legal conclusion that Sandberg was not a proper class representative because she did not rely on the alleged misrepresentations in the proxy statement. We further find that the lower court abused its discretion in denying certification on the grounds of possible conflict of interest or lack of interest. Finally, we find that the then-pending state court action did not present a sufficient obstacle to certification of a class consisting of all other minority stockholders. Accordingly, the order denying class certification will be reversed and the case remanded for entry of an order certifying a class.

III. RELIANCE

Bankshares and the directors contend that, even assuming that the proxy statement contained material misrepresentations or omitted material facts, only a presumption of reliance by a stockholder plaintiff arises and, in *Sandberg*, this presumption is conclusively rebutted by Sandberg's admitted lack of reliance on such misrepresentations or omissions. We hold, however, that reliance is not an element of a § 14(a) action; therefore, the defendants' argument fails.

Section 14(a) of the Securities Exchange Act of 1934 (15 U.S.C. § 78n(a) (1981)) makes unlawful the solicitation of a proxy in respect of any registered security in contravention of rules prescribed by the Securities and Exchange Commission. One such rule, 12 C.F.R. § 335-206, provides as follows:

No solicitation or communication subject to this Subpart B shall be made by means of any statement, form of proxy, notice of meeting, or other communication, written or oral, containing any statement that, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or that omits to state any material fact necessary in order to make the statement therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter that has become false or misleading. Depending upon particular circumstances, the following may be misleading within the meaning of this paragraph: Predictions as to specific future market values, material that directly or indirectly impugns character, integrity, or personal reputation, or directly or indirectly makes charges concerning improper, illegal, or immoral conduct or associations, without factual foundation; failure to so identify a statement, form of proxy, and other soliciting material as to clearly distinguish it from the soliciting material of any other person or persons soliciting for the same meeting or subject matter; claims made prior to a meeting regarding the results of a solicitation.

It is undisputed that this section has given rise to an implied private right of action for damages incurred by aggrieved stockholders. *V.I. Case Co. v. Borak*, 377 U.S. 426, 84 S.Ct. 1555, 12 L.Ed.2d 423 (1964). The threshold issue in these appeals is the effect of Sandberg's admitted lack of reliance on the alleged misrepresentations on her right to recover damages.

In *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970), the Supreme Court was confronted with a similar suit by a class of stockholders alleging violations of § 14(a) by means of a false

and misleading proxy statement. Stressing the importance of informed voting, but recognizing the impracticality of attempting to determine the extent of reliance by thousands of stockholders on alleged misrepresentations in the proxy statement, the Court held that a finding that the misrepresentations and/or omissions were material sufficed to establish the causal relationship between violation and injury if it is further shown that the proxy statement itself was an essential link in the accomplishment of the transaction for which the proxy was sought.[1] *Id.* at 385, 90 S.Ct. at 622.

More recently, in the context of a case brought for violations of Section 10(b) of the Securities Exchange Act of 1934, the Court held that the presumption of reliance flowing from a finding of materiality is merely a rebuttable presumption. *Basic, Inc. v. Levinson*, 485 U.S. 224, 108 S.Ct. 978, 99 L.Ed.2d 194 (1988). Contrary to the defendants' argument, however, the rebuttable presumption in § 10(b) actions is not applicable to § 14(a) actions. The Court stated that a finding of reliance serves to provide "the requisite causal connection between a defendant's misrepresentations and a plaintiff's injury." *Id.* 108 S.Ct. at 989. However, the Court went on to recognize that causal connection could be demonstrated in other ways such as in *Mills*, in which the material misrepresentations of the proxy statement, coupled with a showing that the proxy statement itself was an essential link in the transaction, sufficed. *Id.; accord Hershfang v. Knotter*, 562 F.Supp. 393, 398 (E.D.Va.1983), *aff'd*, 725 F.2d 675 (4th Cir.1984).

Mills left open the question of "whether causation could be shown where management controls a sufficient number of shares to approve the transaction without any votes from the minority." *Mills*, 396 U.S. at 385 n. 7, 90 S.Ct.

---

[1] It is conceded that the proxy statement was, under Virginia law, an essential link for accomplishing the merger. Va.Code Ann. § 13.1-718(B)(1) (1989).

at 622 n.7. In *Schlick v. Penn-Dixie Cement Corp.*, 507 F.2d 374 (2d Cir.1974), the combined votes of the minority shareholders could not have prevented the proposed merger. The Second Circuit, however, pointed to the remedial purpose of the Securities Act in holding that reliance is not a necessary element of causation even in such a situation; to do otherwise "would sanction all manner of fraud and overreaching in the fortuitous circumstance that a controlling shareholder exists." *Id.* at 383, quoting *Swanson v. American Consumer Industries, Inc.*, 415 F.2d 1326, 1331 (7th Cir.1969). We adopt the reasoning in *Schlick* and hold that reliance, even when the minority's voting strength is insufficient to halt a merger, is not an element of causation in a § 14(a) action. Thus, if the proxy statement contained material misrepresentations and was an essential link in the merger, § 14(a) liability may be established.[2]

IV. MATERIAL MISREPRESENTATIONS

To be actionable, a proxy solicitation must either contain false or misleading statements concerning a material fact or omit a material fact. *Alizac Partners v. Rospatch Corp.*, 712 F.Supp. 599, 604 (W.D.Mich.1989). Materiality is determined under an objective standard which contemplates

> a showing of a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder. Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available.

[2] Bankshares' proposed jury charge on "reliance materiality" read in pertinent part as follows:

> If Plaintiff proves that the alleged misstatements and omissions were made or omitted and that they are material as I have just defined that term, she may satisfy the necessary element of reliance if she proves that the proxy solicitation was an essential link in the accomplishment of the transaction.

We are unable to discern how this language differs from our holding on the reliance question.

TSC Industries, Inc. v. Northway, 426 U.S. 438, 449, 96 S.Ct. 2126, 2132, 48 L.Ed.2d 757 (1976). Bankshares and the Bank's directors dissect each alleged misrepresentation and omission in an attempt to show that the facts implicated by each were not material. While we appreciate the need to avoid setting too low a threshold of liability in such matters, we are persuaded that at least two of the allegations were sufficiently strong as to require that they be given to the jury to make that "delicate assessment of the inferences a 'reasonable shareholder' would draw" from the facts presented by Sandberg. *Id.*

The proxy statement contained a representation by the Bank's directors that they recommended approval of the merger because it offered the minority stockholders an opportunity to receive a high value for their shares. Sandberg attacked this as a material misrepresentation and alleged that the directors' real reason was a fear of replacement on the board. Va.Code Ann. § 13.1-718(B)(1) requires that the directors state their recommendation to the stockholders, and 12 C.F.R. § 355.212, Item 14(a), requires that the reasons for the merger be set forth. From the evidence at trial, the jury was certainly justified in believing that the directors did not believe a merger at $42 per share was in the minority stockholders' interest but, rather, that they voted as they did for other reasons, *e.g.*, retaining their seats on the board. Indeed, the entire thrust of Sandberg's case was that FABI orchestrated the merger from the outset and that the Bank's directors were considerably less concerned with the stockholders' interest than with their own. For instance, Sandberg adduced evidence that the directors failed to retain an independent investment

banker for an opinion on the value of the stock and instead accepted the $42 per share opinion of the firm retained by FABI. We cannot say that the directors' recommendation that the $42 offer was fair to the minority stockholders was, as a matter of law, not a material misrepresentation. *Cf. Denison Mines, Ltd. v. Fibreboard Corp.*, 388 F.Supp. 812, 821 (D.Del.1974) (in recognition of the impact of a reference to an investment advisor's opinion on a substantial number of stockholders, it was held that it was materially misleading as a matter of law to omit the basis for the advisor's opinion).

The proxy statement also stated that FABI had hired KBW "to pass on the fairness of the merger from a financial point of view," although whether KBW's opinion focused on fairness to Bankshares or to the minority stockholders is disputed. It is admitted that KBW relied only on the market price to set a value on the stock, and Sandberg's expert witness was able to show that the actual value was considerably higher (see Part VI, *infra*). Also, the independence of KBW was brought into question. For example, Beddow had opined to KBW that $42 was considered by FABI to be a fair price; coupled with the fee agreement by which KBW would receive $75,000 upon completion of the merger (in addition to the initial $25,000 payment), a substantial incentive to satisfy FABI was clearly present. That KBW's $42 valuation was something less than the product of a completely independent analysis was a question of fact. The representation in the proxy statement that it was such an independent determination could certainly have been found to be a material misrepresentation.[3] We hold,

[3] The other four allegations of material misrepresentations/omissions in the proxy statement were these: (1) failure to disclose that VBI, by virtue of its 85% holdings, had the voting power to elect members of the Bank's board; (2) statement that the recommended price per share was the result of negotiations; (3) failure to disclose financial information, including the value of the Bank's real estate holdings, which would show a value per share in excess of $42; and (4) failure to disclose that Beddow was also an officer of FABI.

therefore, that it was not error for the court to submit the issue of materiality to the jury.

Even assuming that some of the alleged misrepresentations were correctly submitted to the jury, the defendants contend that it is reversible error to have submitted any alleged misrepresentations which were not material as a matter of law. Contrary to defendants' argument, however, the submission of both correct and incorrect factual bases supporting a single theory of recovery is not grounds for reversal of a judgment on a general verdict. The cases cited by the defendants to the contrary involve the submission of both incorrect and correct legal theories of recovery. Compare *Gill v. Rollins Protective Services Co.*, 722 F.2d 55, 59 (4th Cir. 1983) (general verdict set aside when one of two legal theories erroneously submitted to the jury), with *Baumler v. State Farm Mutual Automobile Insurance*, 493 F.2d 130, 134 (9th Cir.1974) (general verdict upheld if sufficient evidence to support one of two actual theories of recovery on a single cause of action). We will not reverse on the ground that some of the allegations may have been immaterial as a matter of law.

As an alternative ground upon which to uphold the verdict despite the possibly incorrect submission of some alleged material misrepresentations to the jury, Sandberg points to the failure of the defendants to object to the following proposed jury instruction:

> The defendants either deny that these [the six alleged misrepresentations/omissions] were not disclosed or say that even if they weren't, they were not material omissions or misrepresentations. In order to establish then the first essential element under her Federal Securities Act claim, Count I, Ms. Sandberg must prove by a preponderance of the evi-

> dence first that the defendants made *one or more* of the misrepresentations of the fact as alleged or omitted to state facts which would be necessary to make other statements by the defendants not misleading to the plaintiff.

(Emphasis added.) The defendants' failure to object precludes them from assigning as error the giving of this instruction. Fed.R.Civ.P. 51. The failure to object provides an independent ground to reject defendants' argument. *Ramsey Products Corp. v. Morbark Industries, Inc.*, 823 F.2d 798, 804 (4th Cir.1987).

V. STATE LAW CLAIMS

Count II of the *Sandberg* suit was based on alleged violations of Va.Code Ann. § 13.1-690 (1989), which requires each corporate director to act "in accordance with his good faith business judgment of the best interests of the corporation." This statute also permits a director to rely on certain reports, information or opinions which he "believes, in good faith, to be reliable and competent." *Id.* Sandberg's state law claims were based on the directors' alleged failure to make a good faith effort to inform themselves as to the fairness of the merger proposal or to negotiate with Bankshares to obtain a higher price per share of the Bank stock. We reject the directors' argument that the evidence failed to show their lack of good faith.

The directors contend that evidence of "bad faith" was lacking because three directors who testified during the *Sandberg* trial all stated that, in their opinion, the $42 per share price was fair to the minority stockholders. They further contend that their reliance on the investment consultant retained by Bankshares and on the executive committee's recommendation to accept the $42 figure was justified under the statutory standard, as was their decision not to seek a second, independent opinion. These arguments are unavailing. The case against

the directors is that they merely rubberstamped everything placed before them by Bankshares. The evidence fully supports a view that the directors exercised no independent judgment whatsoever with regard to the interests of the minority stockholders and consequently, was sufficient to support the jury's finding of lack of good faith.

VI. DAMAGES

The jury in *Sandberg* awarded her an additional $18 per share over the $42 per share value of her stock resulting from the merger. The judgment in Count I (federal securities law violations) was entered against all defendants jointly and severally. Judgment on Count II (state law breach of fiduciary duty claims) was entered against the directors as an "alternative judgment;" the jury found for the corporate defendants on this count. Bankshares and the directors contend that the damage verdict cannot stand because it was based on impermissibly speculative evidence. Moreover, the directors contend that Sandberg's expert totally disregarded the market price of the Bank stock and that Virginia law governing the stock evaluation under Count II required that evidence on damages give some consideration to market price. The directors further attack the expert's equal valuation of both minority-held and majority-held stock. We turn first to Sandberg's evidence.

The verdict that Sandberg's stock was worth $60 at the time of the merger clearly evinces acceptance by the jury of the testimony of her expert witness. Sandberg's expert testified that he used two methods to evaluate Sandberg's stock. First, the dividend discount method yielded a value based on the company's projected ability to pay future dividends. Second, the stock prices of comparable banking organizations in and near Virginia were analyzed in terms of price/earnings and price/book multiples. Each of these methods yielded a value of approximately $60 per share. Since the market for the shares

was very inactive and the market price was inconsistent with that of comparable companies, the expert testified that he was not able to use market value to evaluate the stock. He also explained that the existence of an 85% majority shareholder acted to dampen trading activity due to uncertainty about the majority shareholder's intentions. There is no argument that the expert's opinion was based on anything other than information reasonably relied upon by experts in the particular field, and this is all that Fed.R.Evid. 703 requires.

The directors cite *Lucas v. Pembroke Water Co.*, 205 Va. 84, 135 S.E.2d 147, 150 (1964), for the proposition that Virginia law requires consideration of the market price in any determination of damages measured by the value of stock. *Pembroke Water*, however, involved a statutory procedure by which a court could appoint appraisers to fix a stock's value. In that case, the state appellate court held that the lower court was required to, and in fact did, consider the four necessary elements to arrive at the "fair value" of the stock: market value, net asset value, investment value, and earning capacity. *Id.* That a court, as the fact finder in an equitable proceeding, is required to consider each element does not mean that a plaintiff seeking to show a stock's value in an action at law must similarly employ each valuation method. In any event, even if the defendants are correct that market value must be considered, the requirement was satisfied. Sandberg's expert did consider the market value but determined that it was not a reliable indicator of the stock's inherent value. *See Atlantic States Const., Inc. v. Beavers*, 169 Ga.App. 584, 314 S.E.2d 245, 249 (1984) ("flexible approach" in determination of fair value adopted for statutory appraisal proceeding). It was not error to deny defendants' motions for directed verdict.

The defendants proposed a jury instruction to the effect that the jury could take into account that minority

shares ordinarily do not have the same value as shares held by a majority shareholder. As a legal basis for this instruction, the directors cited *Glass v. Glass*, 228 Va. 39, 321 S.E.2d 69, 76 (1984). That the jury was not instructed that the value of a minority interest is often discounted does not in and of itself justify reversal of the *Sandberg* judgment. It is sufficient that the defendants' expert was not prohibited from testifying regarding his finding of a lower value based in part on discounting due to the minority status of Sandberg's stock. The defendants cite to nothing in the record to support a finding that the minority's holdings should be discounted or, if so, how much. In view of this lack of evidence, we think that the lower court properly refused to instruct the jury on discounting the value of minority-held shares.

VII. OFFENSIVE COLLATERAL ESTOPPEL

After entry of the *Sandberg* judgment, the *Weinstein II* plaintiffs moved for summary judgment on the ground that collateral estoppel barred relitigation of the issues decided in *Sandberg*. The lower court granted the motion and entered judgment on the basis of an additional $18 for each share held by the *Weinstein II* plaintiffs. Bankshares contends that the lower court erred, but we disagree and hold that the doctrine of offensive collateral estoppel was properly applied in this case.

Parklane Hosiery Co. v. Shore, 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979), also arose out of a stockholder action involving an allegedly false and misleading proxy statement. In another action, the Securities and Exchange Commission had obtained a declaratory judgment against the company and its directors that the same proxy statement was materially false and misleading in essentially the same respects as alleged in the shareholders' suit. The shareholder plaintiffs then moved for partial summary judgment on the ground that the

company and directors were collaterally estopped from relitigating the same factual issues which had been decided adversely to them in the SEC action. The motion was granted, and the Supreme Court sanctioned this use of offensive collateral estoppel.

In *Parklane Hosiery*, the Supreme Court established as a general rule that offensive collateral estoppel should not be used when the plaintiff invoking the doctrine could easily have joined the defendant in the earlier action or if it would be unfair to the defendant for other reasons. Possible reasons for unfairness might be that the earlier suit was of such small value that it provided little incentive for a vigorous defense, or that the defendant has procedural advantages in the later action that were unavailable in the earlier suit and which might cause a different result. The Court cautioned that its use should be subject to the broad discretion of the district court. *Id.* at 331, 99 S.Ct. at 651-52. We find that this discretion was properly exercised by the lower court. None of these exceptions are presented by the *Sandberg* and *Weinstein II* cases.

It was the defendants who opposed expansion of *Sandberg* by addition of the *Weinstein I* group or of the entire minority shareholder class. Moreover, the stakes were evident from the outset in *Sandberg*, and the defendants do not complain now that they had insufficient incentive to vigorously defend. If the *Sandberg* judgment stands, as we have decided it should, then *Parklane Hosiery* clearly sanctions the summary judgment in *Weinstein II*.

VIII. LIABILITY CAPS

In its *Weinstein II* judgment, the court imposed caps on the liability of each of the defendant Bank directors under the judgment on the state-law claims. This effectively reduced the plaintiffs' "alternative" judgment on the state-

law count by $965,682.66.[4] The authority for the imposition of the caps is Va.Code Ann. § 13.1-692.1 (1985) which provides in pertinent part as follows:

> A. In any proceeding brought by or in the right of a corporation or brought by or on behalf of shareholders of the corporation, the damages assessed against an officer or director arising out of a single transaction, occurrence or course of conduct shall not exceed . . .
>
> 2. The greater of (i) $100,000 or (ii) the amount of cash compensation received by the officer or director from the corporation during the twelve months immediately preceding the act or omission for which liability was imposed.

Judgment on Court II was limited to $100,000 against each of eighteen individual directors and to the annual salaries of two others. The plaintiffs contend that the statute under which the caps were imposed deprives them of their constitutional rights to trial by jury, due process, and equal protection.

In *Boyd v. Bulala*, 877 F.2d 1191 (4th Cir.1989), this Court addressed the constitutionality of a Virginia statute which placed a cap on medical malpractice liability. On the basis of the reasoning of the Supreme Court of Virginia's opinion in *Etheridge v. Medical Center Hospitals, Inc.*, 237 Va. 87, 376 S.E.2d 525 (1989), we held that the statutory cap in Va.Code Ann. § 8.01-581.15 (1984) did not violate the plaintiffs' Seventh Amendment right to a trial by jury. We see no basis for distinguishing the malpractice cap from the one applied to the Bank directors' liability on the state cause of action. *See also Franklin v. Mazda Motor Corp.*, 704 F.Supp. 1325 (D.Md.1989) (Seventh Amendment challenge to Maryland malpractice cap

---

[4] The judgment on Count II in *Weinstein II* is $3,292,236, whereas the caps act to limit the total liability on Count II to only $2,346,553.34.

rejected). Because they were not raised below, we do not reach the equal protection and due process challenges to the statute. *United States v. One 1971 Mercedes Benz 2-Door Coupe*, 542 F.2d 912, 915 (4th Cir.1976).

IX. RES JUDICATA EFFECT OF *WEINSTEIN I*

As previously noted, the sixteen *Weinstein I* petitioners sought damages for breach of fiduciary duties in the state courts, and the appeal of the dismissal of their action was pending when the *Weinstein II* judgment was entered. The directors contend that the doctrine of *res judicata* precludes the state law claims in *Weinstein II*. The district court rejected this argument, and we do likewise.

In a letter opinion outlining the basis for the dismissal of the *Weinstein I* complaint, the Virginia Circuit Court judge explained that Va.Code Ann. § 6.1-43 (1989) specifically and clearly exempted holders of bank stock from the statutory appraisal remedy provided for in Va.Code Ann. § 13.1-730 (1989). Rejecting the *Weinstein I* plaintiffs' argument that a common law right of appraisal existed despite the statutory exclusion, the circuit court judge noted that an action at law for damages might nevertheless be available for breach of fiduciary duty or fraud. The judge added, however, that the amended complaint did not allege facts sufficient to support such claims.

In their brief to this Court, the directors concede that the *Weinstein I* plaintiffs could have transferred their damage claim to the law side of the state court. They contend, however, that the *res judicata* bar arose when the order dismissing their state court action was appealed rather than transferred and, therefore, that the district court erred in denying the defendants' motion for a directed verdict on Count II in *Weinstein II*. An analysis of the Virginia case law on point leads us to a different conclusion.

In *Flora, Flora & Montague, Inc. v. Saunders*, 235 Va. 306, 367 S.E.2d 493 (1988), the Supreme Court of Virginia reiterated its rule against claim-splitting in the context of two cases brought on the chancery side of court involving the same contract. This case is inapposite to the *Weinstein* cases, however. As previously noted, the *Weinstein I* plaintiffs could have transferred their damage action to the law side of the state court. Moreover, it is clear that the § 14(b) action could only have been filed in federal court. 15 U.S.C. § 78aa (1989 Supp.). Thus, we are unconvinced that the consolidation of the federal and state claims in a single federal suit violates the policy against claim-splitting; in fact, such a single filing would appear to promote the policy. We note that the Virginia courts have repeatedly held that Va. Code § 8.01-270 is a remedial statute designed to save costs and prevent delay. *See, e.g., Thomas v. Lauterbach*, 205 Va. 176, 135 S.E.2d 781 (1964). The directors argue that the decision to appeal from the order dismissing the action, rather than moving to transfer the breach of fiduciary claim to the law side of the court, forecloses the sixteen *Weinstein I* plaintiffs from pursuing their state-law claims in the federal action. This strikes us as precisely the sort of technical result that the Virginia courts have sough to prohibit. The directors' *res judicata* argument is rejected.[5]

---

[5] The directors make two additional arguments: (1) Virginia's one-year statute of limitations bars the state law claims in *Sandberg*, and (2) the *Sandberg* verdicts are irreconcilably inconsistent. As to the first argument, Sandberg's state law cause of action accrued on the date of the merger itself, this being the date on which she was injured by the conversion of her stock to a right to receive $42 per share. The merger was consummated on May 27 1987, and *Sandberg* filed her action on March 1988. As to the second argument, the verdicts arose from claims consisting of different elements, and the exoneration of Bankshares on the state law claims may have been due to the jury's belief that the relationship between Bankshares and the minority stockholders was too tenuous for liability to attach. Neither argument presents grounds for reversal.

X. ATTORNEYS' FEES

In *Sandberg* and *Weinstein II*, the prevailing parties moved for awards of attorneys' fees against FABI and VBI. The lower court in each case denied such fees on the grounds that the benefit of the judgments flowed only to the plaintiffs in each case and not to the corporate defendants. The court acknowledged the deterrent effect of such fees, but concluded that the judgments increasing the price for each minority-held share by $18 acted as an adequate deterrent.

In *Mills v. Electric Auto-Lite Company*, 396 U.S. 375, 390, 90 S.Ct. 616, 624-25, 24 L.Ed.2d 593 (1970), the Supreme Court held that the absence of express statutory authorization is not a bar to a fee award in § 14(a) stockholder actions, and under "special circumstances" such fees should be recoverable. We express no opinion as to whether such "special circumstances" exist in *Sandberg*; however, in view of the transformation of *Sandberg* into a class action, the order denying the motion for an award of attorneys' fees is vacated and the matter remanded for reconsideration. We find no abuse of discretion in the denial of fees in *Weinstein II*, and, accordingly, that order is affirmed.

XI. SUMMARY

The judgment in *Sandberg* is affirmed and the case is remanded with directions to enter an order certifying a class of all non-defendant minority stockholders except those who were plaintiffs in *Weinstein II*. The order denying attorneys' fees in *Sandberg* is vacated and remanded for reconsideration in light of the class certification ruling. The judgment in *Weinstein II* is affirmed, as is the order denying attorneys' fees.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Case Number: C/A88-299-A

DORIS I. SANDBERG

v.

VIRGINIA BANKSHARES, INC., *et al*

JUDGMENT IN A CIVIL CASE

☒ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED that judgment is hereby entered in favor of the plaintiff, Doris I. Sandberg, against the defendants Virginia Bankshares, Inc., First American Bankshares, Inc., Emanuel A. Baker, Jr., Jack W. Beddow, Harriet F. Bradley, Joel T. Broyhill, Thomas B. Chamberlin, Thomas P. Chisman, Sidney O. Dewberry, Milton L. Drewer, Jr., Eric W. Erdossy, George W. Johnson, Charles T. Lindsay, Jr., Donald R. Maxfield, Linda H. Michael, Milton V. Peterson, E. Guy Ridgely, Glenn W. Saunders, Charles H. Smith, Jr., Verlin W. Smith, Henry A. Thomas, and Stephen G. Yeonas, jointly and severally, in the amount of $43,956.00 in accordance with the verdict of the jury.

Date: September 29, 1988

DORIS R. CASEY
Clerk

/s/ _____
(By) Deputy Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 88-1020-A

PAUL H. WEINSTEIN, *et al.*,
Plaintiffs,

v.

FIRST AMERICAN BANKSHARES, INC., *et al.*,
Defendants.

ORDER

For the reasons stated from the bench on November 4, 1988, it is hereby ORDERED that:

1. The motion of the plaintiffs for summary judgment is GRANTED in the following respects:

2. Judgment is hereby entered on Count I in favor of the plaintiffs against the defendants jointly and severally, in the total amount of $3,292,236, representing $18 per share held by each plaintiff, as itemized in Exhibit A attached hereto.

3. Alternatively, judgment is hereby entered on Count II in favor of the plaintiffs against the defendants Emanuel A. Baker, Jr., Jack W. Beddow, Harriet P. Bradley, Joel T. Broyhill, Thomas B. Chamberlin, Thomas P. Chisman, Sidney O. Dewberry, Milton L. Drewer, Jr., Eric W. Erdossy, George W. Johnson, Charles T. Lindsay, Jr., Donald R. Maxfield, Linda H. Michael, Milton V. Peterson, E. Guy Ridgley, Glenn W. Saunders, Charles H. Smith, Jr., Verlin W. Smith, Henry A. Thomas, and

Stephen G. Yeonas, jointly and severally, in the amount of $18 per share held by each plaintiff as itemized in Exhibit A, attached hereto; provided, however, that as to Count II the individual liability of defendants Emanuel A. Baker, Jr., Jack W. Beddow, Harriet P. Bradley, Joel T. Broyhill, Thomas B. Chamberlin, Thomas P. Chisman, Sidney O. Dewberry, George W. Johnson, Charles T. Lindsay, Jr., Donald R. Maxfield, Linda H. Michael, Milton V. Peterson, E. Guy Ridgley, Glenn W. Saunders, Charles H. Smith, Jr., Verlin W. Smith, Henry A. Thomas, and Stephen G. Yeonas shall not exceed $100,000, that the liability of defendant Milton L. Drewer, Jr. shall not exceed $390,329.00, and that the liability of defendant Eric W. Erdossy shall not exceed $156,224.34.

4. The motion of the plaintiffs to dismiss Count II without prejudice as against First American Bankshares, Inc. and Virginia Bankshares, Inc., is GRANTED.

5. The motion of the defendants to strike the plaintiffs' prayer for punitive damages is GRANTED.

/s/ G. V. B. J.
United States District Judge

DATED: November 15th, 1988

AGREED AS TO FORM:

HOGAN & HARTSON

By /s/ David G. Leitch
JOSEPH M. HASSETT
JOHN C. KEENEY, JR.
GEORGE H. MERNICK, III
DAVID G. LEITCH
Attorneys for Plaintiffs

HUNTON & WILLIAMS

By /s/ Thomas J. Cawley [Illegible]
THOMAS J. CAWLEY
STEPHEN M. SAYERS
Attorneys for Defendants
First American Bankshares, Inc. and
Virginia Bankshares, Inc.

MCGUIRE, WOODS, BATTLE & BOOTHE

By /s/ John S. Stump [Illegible]
JOHN S. STUMP
SEAN F. MURPHY
ROBERT R. VIETH
Attorneys for Director Defendants

APPENDIX D

NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Judicial Center
4110 Chain Bridge Road
Fairfax, Virginia 22030

County of Fairfax City of Fairfax City of Falls Church

October 6, 1987

Wendy L. Wysong, Esq.
John C. Keeney, Jr., Esq.
Joseph M. Hassett, Esq.
Hogan & Hartson
815 Connecticut Avenue
Washington, D.C. 20006-4072

Janis Orfe, Esq.
Vice President and General Counsel
First American Bank of Virginia
1970 Chain Bridge Road
McLean, Virginia 22102

John S. Stump, Esq.
McGuire, Woods, Battle & Boothe
8280 Greensboro Drive
Suite 900
P. O. Box 9346
McLean, Virginia 22102

Thomas J. Cawley, Esq.
Stephen M. Sayers, Esq.
Hunton & Williams
3050 Chain Bridge Road
Fairfax, Virginia 22030

Michael J. Lyon, Esq.
Clifford & Warnke
815 Connecticut Avenue, N.W.
Washington, D.C. 20006

Re: *Weinstein, et al v. First American Bank of Virginia, et al*
Chancery No. 101443

Dear Counsel:

This matter is before the Court on Defendants' Demurrer to Count III of the Amended Bill of Complaint. In Count III, Complainants allege that Defendants breached their fiduciary duty to treat the minority stockholders fairly in selecting the price to be paid for stockholder shares following a freeze-out cash-out merger. After consideration of the oral arguments and memoranda of law, the Defendants' Demurrer is sustained.

Complainants contend that Defendants have a duty to pay fair value for the stock and that Complainants may resort to a court of equity for enforcement. Both parties acknowledge that Va. Code § 6.1-43 exempts holders of bank shares from the statutory appraisal rights found in Va. Code § 13.1-730. However, Complainants argue that there remains a common law counterpart to statutory appraisal not affected by § 6.1-43. With this, I disagree.

Historically, the appraisal right, a statutory creation, was designed to protect dissenters' interests when legislation was enacted to permit mergers without unanimous consent. Statutory appraisal is now considered the exclusive remedy for stockholders opposing a merger. *See Adams v. United States Distributing Corp.*, 184 Va. 134, 34 S.E.2d 244 (1945), *cert. denied*, 327 U.S. 788 (1946). However, dissenting stockholders in bank mergers do not even have this solitary remedy available to them. Va. Code § 6.1-43 specifically excludes bank mergers from application of § 13.1-730. While the result may seem harsh, this is how the General Assembly chose to balance the competing interests of minority stockholders versus those of the depositing public. Investors who opt to purchase stock in a bank do so with the knowledge that § 13.1-730 is not available to them in the event of a freeze-out. *See The Pittston Co. v. O'Hara*, 191 Va. 886, 63 S.E.2d 34 (1951); *Adams*, 184 Va. at 149, 34 S.E.2d at 251 (well-established that State's corporation law is part of contract between corporation and its stockholders).

The absence of a statutory appraisal remedy is not to be construed as a license to bank directors to set unfair prices. Complainants may have an action at law for damages if they can show that a breach of fiduciary duty or fraud prompted the Board to recommend an inadequate price for the shares. In the present case, however, complainants have not alleged facts sufficient to support either of these claims.

The General Assembly has seen fit to deny the appraisal remedy to dissenters in a bank merger. Complainants

may not obtain that which the legislature has taken away by masking their request as the enforcement of an equitable duty.

Mr. Cawley will prepare an order reflecting this decision and submit it to opposing counsel for endorsement.

Very truly yours,

/s/ Johanna L. Fitzpatrick
JOHANNA L. FITZPATRICK

JLF/11r

APPENDIX E

FIRST AMERICAN BANK OF VIRGINIA
1970 Chain Bridge Road
McLean, Virginia 22102

NOTICE OF ANNUAL MEETING
OF SHAREHOLDERS

April 21, 1987

To All Shareholders of First American Bank of Virginia

FIRST AMERICAN BANK OF VIRGINIA
1970 Chain Bridge Road
McLean, Virginia 22102

NOTICE OF ANNUAL MEETING OF SHAREHOLDERS

April 21, 1987

To All Shareholders of First American Bank of Virginia

Notice is hereby given that the Annual Meeting of Shareholders of First American Bank of Virginia will be held on Tuesday, April 21, 1987, at 2:00 p.m., at the office of First American Bank of Virginia, 1970 Chain Bridge Road, McLean, Virginia, for the following purposes:

1. To elect the directors of the First American Bank of Virginia to serve until the next annual meeting or until their successors may be elected.
2. To consider and vote upon an Agreement and Plan of Merger dated February 12, 1987 among Virginia Bankshares, Inc., FAB Acquisition Bank, a wholly owned subsidiary of Virginia Bankshares, Inc., and First American Bank of Virginia pursuant to which (a) FAB Acquisition Bank will be merged into First American Bank of Virginia and (b) each holder of common stock of First American Bank of Virginia, other than Virginia Bankshares, Inc., will be entitled to receive $42 cash, without interest, for each share held.

Only shareholders of record at the close of business on March 6, 1987 are entitled to notice of and to vote at the Annual Meeting and any adjourning thereof. Shareholders of First American Bank of Virginia are not entitled to assert dissenters' rights in connection with the merger.

/s/ Milton L. Drewer, Jr.
MILTON L. DREWER, JR.
Chairman of the Board and
Chief Executive Officer

Anticipated Mailing Date:
March 25, 1987

We hope you can attend this meeting in person. We urge you to mark, date, sign and return the enclosed Proxy in the enclosed postage-paid envelope, promptly, whether or not you plan to attend the meeting in person. Execution of the Proxy will not in any way affect your right to attend the meeting and vote in person if you wish to do so. Any shareholder giving a Proxy has the right to revoke it anytime before it is exercised, if he wishes, by submitting a written request for such revocation to the Secretary of First American Bank of Virginia.

SUMMARY

The following is a summary of certain information contained elsewhere in this Proxy Statement. For a more complete statement, reference is made to, and this summary is qualified in its entirety by, the more detailed information contained in the Proxy Statement, the appendices hereto and the documents referred to herein.

First American Bank of Virginia and Virginia Bankshares, Inc.

First American Bank of Virginia (hereinafter "the Bank") is a commercial bank chartered in Virginia with 101 full service banking offices located throughout the Commonwealth. On December 31, 1986, the Bank reported total assets of $2,849,847,000. See "Business of the Bank."

Virginia Bankshares, Inc. (hereinafter "Virginia Bankshares") is a registered bank holding company and a wholly-owned subsidiary of First American Bankshares, Inc. (hereinafter FABI"), also a registered bank holding company. Virginia Bankshares owns 85% of the issued and outstanding common stock of the Bank. See "Principal Holder of Voting Securities."

Election of Directors

At the Annual Meeting, the Bank's shareholders will be asked to elect directors of the Bank to serve until the next annual meeting or until their successors may be elected.

Merger with FAB Acquisition Bank

At the annual meeting, the Bank's shareholders will also be asked to approve the Plan of Merger that provides for the merger (the "Merger") of FAB Acquisition Bank, a wholly-owned subsidiary of Virginia Bankshares, with and into the Bank under the Bank's Restated Articles of Incorporation. The Plan of Merger provides for a cash payment to the Bank's shareholders, other than Virginia Bankshares, of $42 for each share of the Bank's common stock that they hold. See "The Proposed Merger."

Shareholder Approval

Pursuant to the Virginia Stock Corporation Act, the affirmative vote of the holders of more than two-thirds (66⅔%) of the votes entitled to be cast by the Bank's common stock will be required to approve the Plan of Merger. Virginia Bankshares, as holder of all of the outstanding shares of FAB Acquisition Bank, has approved the Plan of Merger. Because Virginia Bankshares owns 85% of the Bank's issued and outstanding common stock, and has indicated its intention of voting its shares for approval of the Plan of Merger, the Bank's Board of Directors expects the Plan of Merger to be approved. See "Outstanding Shares and Voting Rights."

Recommendation of the Board of Directors

The Bank's Board of Directors has approved the Plan of Merger and believes that the terms of the Merger are fair to its shareholders and that the proposed Merger is in the best interest of shareholders of the Bank. Ac-

cordingly, the Board recommends that shareholders vote for the proposed Merger. The Board of Directors believes that the proposed Merger will enable the Resulting Bank to compete more effectively, provide the opportunity to realize certain economics, and result in an institution better able to respond to technological change. The Board believes that the price to be paid to shareholders other than Virginia Bankshares is fair. The Board of Directors is aware that the recent trend in formation of bank holding companies is for subsidiary banks to be wholly-owned subsidiaries rather than to have an outstanding minority interest. See "The Proposed Merger—Background of the Merger."

Opinion of Investment Banker

FABI's Board of Directors commisisoned Keefe, Bruyette & Woods, Inc., an independent investment banking firm, to pass on the fairness of the Merger from a financial point of view. This opinion, which is included in the Proxy Statement as *Appendix III*, should be read in its entirety. See "The Proposed Merger—Opinion of Financial Adviser."

Management of the Resulting Bank

After the Effective Date of the Merger, the Board of Directors of the Resulting Bank will consist of the members of the Board of Directors of the Bank immediately preceding the Effective Date of the Merger. Similarly, the principal executive officers of the Resulting Bank will consist of the principal officers of the Bank immediately preceding the Effective Date of the Merger. See "Management of Resulting Bank."

Dissenters' Rights

Under the Virginia Banking Act, holders of the Bank's common stock will not be entitled to statutory dissenters' rights with respect to the Merger. See "Rights of Dissenting Shareholders."

Federal Income Tax Consequences

Generally, if the Merger is consummated, each shareholder other than Virginia Bankshares will recognize taxable gain or loss for federal income tax purposes equal to the difference, if any, between the amount of cash received pursuant to the Merger and the cost or other tax basis of the shareholder's Bank common stock. Each shareholder should consult his tax adviser as to the particular consequences of the Merger to him, including the application of state, local and foreign tax laws. See "The Merger—Federal Income Tax Consequences."

Recent Market Prices, Dividends

The Bank's common stock is traded in the over-the-counter market. The following table sets forth for the period indicated the prices per share and the amount of cash dividends per share by quarters for 1987 (to date), 1986 and 1985.

	1987		
Two Months Ending	Sales *		Dividends Per Share
	High	Low	
February 28	$39	$32	$.30 per quarter

	1986		
Quarter Ended	Sales *		
	High	Low	
March 31	$31	$31	$.30 per quarter
June 30	32	32	
September 30	32	32	
December 31	32	32	

	1985				
Quarter Ended	Bid/Sales *		Asked		
	High	Low	High	Low	
March 31	$30	$30	$33	$33	$.30 per quarter
June 30	30	30	N/A	N/A	
September 30	30	30	N/A	N/A	
December 31	30	31	N/A	N/A	

* NASDAQ revised its method of reporting stock prices on April 1, 1985 to report only high and low sales prices.

Selected Financial Data

The following table sets forth certain historical consolidated financial information for the Bank. This information is based on the financial statements of the Bank included in this Proxy Statement and should be read in conjunction therewith. The data have been adjusted for stock splits and stock dividends during the indicated period.

FIRST AMERICAN BANK OF VIRGINIA

YEAR ENDED DECEMBER 31
(IN THOUSANDS, EXCEPT PER SHARE AMOUNTS)

SUMMARY OF OPERATIONS	1986	1985	1984	1983	1982
INTEREST INCOME	$ 222,327	$ 211,101	$ 195,864	$ 148.879	$ 139,473
INTEREST EXPENSE	118,865	119,019	114,051	82,078	81,711
NET INTEREST INCOME	103,462	92,082	81,813	66,801	57,762
PROVISION FOR LOAN LOSSES	6,000	5,400	2,750	2,032	1,333
NET INTEREST INCOME AFTER PROVISION FOR LOAN LOSSES	97,462	86,682	79,063	64,769	36,429
NON-INTEREST INCOME	32,278	24,463	20,395	15,186	10,582
NON-INTEREST EXPENSE	94,224	82,736	77,460	55,798	49,753
INCOME BEFORE APPLICABLE INCOME TAXES	35,516	28,409	21,998	24,157	17,658
APPLICABLE INCOME TAXES	10,749	7,219	4,635	6,950	3,737
NET INCOME	$ 24,767	$ 21,190	$ 17,363	$ 17,207	$ 13,921
PER SHARE:					
NET INCOME	$ 5.10	$ 4.48	$ 3.67	$ 3.64	$ 2.95
CASH DIVIDENDS PAID	1.20	1.20	1.20	1.13	0.95
RETURN ON ASSETS	0.98%	0.98%	0.93%	1.16%	1.11%
RETURN ON EQUITY	16.45%	16.39%	15.01%	15.63%	14.35%
AVERAGE COMMON SHARES OUTSTANDING	4,859,744	4,727,449	4,727,449	4,727,449	4,715,993

SUMMARY OF OPERATIONS—Continued	1986	1985	1984	1983	1982
BALANCE SHEET DATA			AT YEAR END		
ASSETS	$ 2,849.8	$ 2,377.5	$ 2,000.7	$ 1,817.0	$ 1,349.6
DEPOSITS	2,465.4	2,062.6	1,749.3	1,584.4	1,153.4
LOANS (NET)	1,835.2	1,557.2	1,289.4	919.0	754.2
SECURITIES	375.1	353.4	360.9	428.0	265.4
SHAREHOLDERS' EQUITY	163.1	139.1	123.6	115.4	103.5
			AVERAGE BALANCE		
ASSETS	$ 2,533.1	$ 2,158.9	$ 1,864.9	$ 1,485.7	$ 1,258.1
DEPOSITS	2,193.7	1,882.4	1,622.7	1,279.8	1,056.4
LOANS (NET)	1,672.6	1,404.2	1,070.4	810.3	739.2
SECURITIES	387.0	350.1	388.7	342.8	240.3
SHAREHOLDERS' EQUITY	150.6	129.3	115.7	110.1	97.0

FIRST AMERICAN BANK OF VIRGINIA
1970 Chain Bridge Road
McLean, Virginia 22102

PROXY STATEMENT

Introduction

This statement is furnished in connection with the solicitation of proxies by the Board of Directors of First American Bank of Virginia ("the Bank") to be used in voting at the Annual Meeting of Shareholders of the Bank, to be held on Tuesday, April 21, 1987 at 2:00 p.m., at the office of the Bank at 1970 Chain Bridge Road, McLean, Virginia. The Bank will begin mailing this Proxy Statement to its shareholders on or about March 25, 1987.

At the Annual Meeting, shareholders will be asked to approve an Agreement and Plan of Merger dated February 12, 1987 (the "Plan of Merger") among the Bank, Virginia Bankshares, Inc. ("Virginia Bankshares") and FAB Acquisition Bank, a wholly-owned subsidiary of Virginia Bankshares, providing for the merger of FAB Acquisition Bank into the Bank and the conversion of each share of the Bank's common stock, other than shares held by Virginia Bankshares, into the right to receive $42 cash. The Resulting Bank will be the Bank, which will operate under the Bank's Articles of Incorporation under the name "First American Bank of Virginia." A copy of the Plan of Merger is attached to this Proxy Statement as *Appendix I.* In addition, shareholders will be asked to vote for directors to serve for the ensuing year.

Voting and Proxy Revocation Rights

Execution of a Proxy will not, in any way, affect a shareholder's right to attend the Annual Meeting and vote in person and any shareholder giving a Proxy has the right to revoke it at any time before it is exercised, if he wishes, by submitting a written request of such revocation

to the Secretary of the Bank. Attendance at the Meeting in and of itself will not constitute revocation of the Proxy.

Shares represented at the meeting by proxies given to the Board of Directors will be voted in the manner specified by the shareholders. If a Proxy is marked neither for nor against the Plan of Merger, shares represented by that Proxy will be voted in favor of the Plan of Merger.

Rights of Dissenting Stockholders

Under the provisions of the Virginia Banking Act, shareholders of a Virginia banking corporation are not granted the right to object to a merger and demand payment for their shares; thus holders of the Bank's common stock do not have statutory dissenters' rights with respect to the Merger.

Outstanding Shares and Voting Rights

The Bank has outstanding 4,896,287 shares of common capital stock and this is the only class of stock authorized for the Bank. Each shareholder, as of the close of business on the Record Date of Friday, March 6, 1987, is entitled to vote at the Annual Meeting one vote for each share of common stock held in his name on the records of the Bank at the close of business on the Record Date. Under the Articles of Incorporation and Bylaws of the Bank, cumulative voting is not permitted.

As of the Record Date the only person, firm or corporation of record, holding or known to the Bank to own beneficially 5% or more of the outstanding voting stock of the Bank was Virginia Bankshares, a bank holding company and a wholly-owned subsidiary of First American Bankshares, Inc. ("FABI") that, on the Record Date, held 4,162,052 shares representing 85% of the outstanding shares of the Bank. Virginia Bankshares has the sole investment and voting power in connection with such

stock. Because Virginia Bankshares owns 85% of the Bank's common stock, and has indicated its intention of voting for the Plan of Merger, the Bank expects the Plan of Merger to be approved and adopted as Virginia law requires the affirmative vote of more than two-thirds (66⅔%) of votes entitled to be cast by the holders of the Bank's common stock to approve the Merger. The address of both Virginia Bankshares and FABI is First American Bank Building, 15th & H Streets, N.W., Washington, D.C. 20005.

Election of Directors

The Articles of Incorporation and Bylaws of the Bank provide that the Board of Directors shall consist of not less than five (5) nor more than thirty-seven (37). The Board of Directors of the Bank has nominated twenty-one (21) persons, reserving the right, in accordance with the Code of Virginia, to increase the membership of the Board during the term but not to exceed the number set by the Bylaws.

The directors are to hold office until the next Annual Meeting of Shareholders in 1988 or until their successors have been duly elected and qualified. The experience and ability of the nominees make it unnecessary, in management's view, to elect the full number of directors authorized by the Articles of Incorporation and Bylaws. It is management's intention that proxies solicited shall be voted for the nominees set forth below unless directions are given to the contrary. In the event any nominee should unexpectedly become unavailable for election as a director, the proxies will be voted for such nominee or nominees, if any, as recommended by management in accordance with its best judgment. In no event will proxies solicited be voted for more than twenty-one (21) nominees.

Management has nominated for re-election all current directors eligible to serve.

Nominees for Directors

No Director owns as much as one percent (1%) of the stock of the Bank. Directors and principal officers of the Bank, as a group, beneficially own 58,249 shares (1.2%) of the Bank's common stock.

The following table sets out the nominees for directors and the shares they own beneficially in the Bank. For each nominee, the table lists additional information, including the nominee's year of birth, the length of service as a director, and a brief account of the nominee's business experience during the past five (5) years.

Name and Year of Birth	Served as Director (1)	Business Experience During Past Five Years and Directorships of Other Public Companies	Number of Shares of the Bank's Common Stock Beneficially Owned, Directly or Indirectly, as of 2/1/87
Emmanuel A. Baker, Jr. (1943)	1976	President, Town & Country Properties, Inc. and Town & Country Properties, Inc. of Maryland (Realtor).	1,506(2)
Jack W. Beddow (1921)	1981	Executive Vice President and Secretary, First American Bankshares, Inc.; Director, First American Bankshares, Inc., and First American Bank of Maryland.	210
Harriet F. Bradley (1921)	1973	Housewife.	286
Joel T. Broyhill (1919)	1965	Investor.	31,250(3)
Thomas B. Chamberlin (1926)	1971	Partner, DeLashmutt Associates (Engineers and Land Surveyors).	2,257(4)
Thomas P. Chisman (1921)	1984	Chairman of Board and Director of Harrogate's, Ltd.; Chairman of Board of TPC, Ltd.	104

Name and Year of Birth	Served as Director (1)	Business Experience During Past Five Years and Director-ships of Other Public Companies	Number of Shares of the Bank's Common Stock Beneficially Owned, Directly or Indirectly, as of 2/1/87
Sidney O. Dewberry (1927)	1965	Partner, Dewberry & Davis (Engineering, Architecture, Planning & Surveying).	2,871(5)
Milton L. Drewer, Jr. (1923)	1966	Chairman of the Board of Chief Executive Officer of First American Bank of Virginia; Director, Virginia Electric Power Company; Director, First American Bank of Maryland; Director, First American Bank, N.A., Washington; President and Chairman of the Board of First American Metro Corp.	5,835(6)
Eric W. Erdossy (1940)	1986	President and Chief Administrative Officer of First American Bank of Virginia.	587(7)
George W. Johnson (1928)	1986	President, George Mason University.	100
Charles T. Lindsay, Jr. (1935)	1973	President, Lindsay Cadillac Company.	350

Donald R. Maxfield (1931)	1973	President, D. R. Maxfield & Company (Certified Public Accountants).	1,038
Thomas G. Mays (1924)	1971	Attorney, Thomas G. Mays, P.C.; formerly Partner with McDermott, Will & Emery, prior to 1983.	526
Linda H. Michael (1936)	1977	Vice President and Treasurer, Michael & Michael, Inc. (Architects).	550
Milton V. Peterson (1936)	1971	President, Milton V. Peterson Investment Company; President, Hazel/Peterson Companies (Land Development).	2,050
Glen W. Saunders, Jr. (1927)	1969	President, International Real Estate Associates, Ltd.	1,442
Dwight C. Schar (1942)	1986	President, NV Homes, Inc.	100
Charles H. Smith, Jr. (1921)	1962	President, Enfield Investment Corporation; Chairman of the Board of Directors of First Federal Savings & Loan Association of Northern Virginia.	700
Verlin W. Smith (1917)	1973	President, Farms & Acreage Inc. (Realtors).	485

Name and Year of Birth	Served as Director (1)	Business Experience During Past Five Years and Director-ships of Other Public Companies	Number of Shares of the Bank's Common Stock Beneficially Owned, Directly or Indirectly, as of 2/1/87
Henry A. Thomas (1934)	1963	Of Counsel, Thomas and Fiske, P.C.: Director, Providence Savings & Loan Association; Director, Real Title Company, Inc.; Commissioner of Accounts, Circuit Court, City of Alexandria, Virginia.	602
Stephen G. Yeonas (1925)	1962	President, Stephen G. Yeonas Company (Builders and Developers); Director, Washington Gas Light Company; Director of Washington Mutual Investors Fund.	5,400(8)

The Bank has had, and expects to have in the future, banking transactions in the ordinary course of its business with directors, officers, principal shareholders, and their associates, on the same terms, including interest rates and collateral on loans, as those prevailing at the same time for comparable transactions with others, and which do not involve more than the normal risk of collectability or present other unfavorable features.

First American Corporation, the parent holding company of FABI, has pledged all of the outstanding stock of FABI to secure a loan of $50,000,000 made to First American Corporation by Banque Arabe et Internationale d'Investissement, 12 Place Vendome, 75001 Paris, France, as agent for a group of banks, to fund in part First American Corporation's acquisition of FABI's stock. It is possible, in the event of default on the loan, that the lenders could foreclose upon the collateral, thus changing the ownership of the stock and effectively bringing about a change of control of FABI.

Credit and Commerce American Investment, B.V., a Netherlands Corporation ("CCAI"), 131-135 De Lairessestraat, Amsterdam, Netherlands, owns all of the stock of First American Corporation (formerly "FBG Holding Corporation"), and the stock of CCAI is, in turn, wholly owned by Credit and Commerce American Holdings, N.V., a Netherlands Antilles Corporation ("CCAH"), 6 Pietermaai, Willemstaad, Curacao, Netherlands Antilles.

According to the most recent filing with the Federal Deposit Insurance Corporation, namely an acquisition statement under Section 13(d) of the Securities Exchange Act of 1934, the name, address, principal occupation and citizenship of the largest shareholder of CCAH is Kamal Adham, P.O. Box 1150, Jeddah, Saudi Arabia, a citizen of Saudi Arabia, who is engaged in international trading activities through International Commercial and Industrial Establishments and Arabian Electronic Projects Establishments, P.O. Box 4657, Jeddah, Saudia Arabia.

THE PROPOSED MERGER

General

This section of the Proxy Statement describes the more important aspects of the proposed Merger but is not complete and is qualified by reference to the Plan of Merger set forth as *Appendix I*. All shareholders are urged to read the Plan of Merger.

Before it becomes effective, the Plan of Merger must be approved by the vote of more than two-thirds of the outstanding Bank common stock entitled to vote. Because Virginia Bankshares owns more than the requisite minimum and has indicated its intention of voting for the Plan of Merger, the Bank's Board of Directors expects the Plan of Merger to be approved. In addition to shareholder approval, the Federal Deposit Insurance Corporation ("FDIC") and the State Corporation Commission of Virginia (the "Corporation Commission") must approve the Merger.

Before acting on the application for approval of the Merger, the FDIC is required to request reports of the competitive factors involved from the Department of Justice, the Comptroller of the Currency and the Board of Governors of the Federal Reserve System. After approval of the Merger, the Department of Justice is notified and the transaction cannot be consummated for a period of 30 days after approval to afford the Department of Justice an opportunity to take such action under the antitrust laws as it deems necessary or desirable in the public interest, including seeking to enjoin the consummation of the transaction. Because Virginia Bankshares already is in a position to control the Bank, the Bank's Board of Directors does not believe that the proposed Merger will stimulate any challenge on antitrust grounds.

It is anticipated that the effective date of the Merger will be on or about May 29, 1987.

Background of the Merger

The proposed Merger represents a continuation of the efforts of FABI to consolidate its banking operations in wholly-owned subsidiaries. In 1983, the merger of four banks, a majority of stock ownership of all of which was owned by the Bank, and a fifth bank not then owned, into the Bank was effected. However, because the Bank at that time was not a wholly-owned subsidiary of Virginia Bankshares, the transaction resulted in the Bank's continuing to have a minority interest of approximately 15% of its outstanding shares held by approximately 2,039 shareholders of record.

In January 1987, FABI proposed a merger to the Bank's Board of Directors. The principal purpose of the Merger is to achieve organizational efficiencies resulting from the Bank's becoming a wholly-owned subsidiary of Virginia Bankshares. Further, the Merger will eliminate the potential for conflicts of interest between minority shareholders of the Bank and Virginia Bankshares and its affiliates. After careful study by the Executive Committee of the Bank's Board of Directors, the Merger was approved by the Board on February 12, 1987 and recommended to the shareholders.

Recommendation of the Board; Reasons for the Merger

At the February 12, 1987 meeting of the Bank's Board of Directors, all directors present unanimously recommended that shareholders vote in favor of approval of the Plan of Merger. The Board's recommendation and conclusion that the Merger is in the best interest of the Bank's shareholders are based upon its evaluation of a number of factors, including those set forth below.

The Plan of Merger has been approved by the Board of Directors because it provides an opportunity for the Bank's public shareholders to achieve a high value for their shares. The price to be paid is about 30% higher

than the $32.50 per share at which the Bank's common stock traded on February 8, 1987, the last trading day prior to announcement of the proposal. In evaluating the fairness of the Merger to the public holders of the Bank's common stock, the Board was aware that the net book value per share on December 31, 1986 was $33.30 and that the $42 per share that will be paid to public holders of the common stock represents a premium of approximately 26% over the book value of the common stock at such date. The Board of Directors was also aware the Bank earned $24,767,000 in the year ended December 31, 1986, compared to $21,190,000 for the 1985 fiscal year.

Opinion of Financial Adviser

The Executive Committee of the Bank's Board of Directors, which had been charged by the full Board of Directors with considering FABI's proposal, also considered a presentation by Keefe, Bruyette & Woods, Inc., an investment banking firm retained by FABI to deliver its written opinion as to the value to be ascribed to the estimated 15% of the shares of the Bank not owned by Virginia Bankshares. Keefe, Bruyette & Woods, Inc., *did not participate in the negotiations in which the price per share to be paid was agreed upon.* The opinion of Keefe, Bruyette & Woods, Inc., which is reproduced in *Appendix III*, relies upon and assumes the accuracy and completeness of the publicly available information concerning the Bank and all additional information concerning the Bank provided by FABI to Keefe, Bruyette & Woods, Inc. Keefe, Bruyette & Woods, Inc. did not attempt to verify independently any such information.

Keefe, Bruyette & Woods, Inc., as part of its investment banking business, is continually engaged in the valulation of commercial bank securities in connection with mergers and acquisitions, negotiated underwritings, secondary distributions of listed and unlisted securities, private placements and valuations for various other purposes. As specialists in the securities of commercial

banks and bank holding companies, Keefe, Bruyette & Woods, Inc. has experience in, and knowledge of, the Virginia banking market and of the major banking companies operating in that market.

For rendering its opinion to FABI, Keefe, Bruyette & Woods, Inc. will be paid $25,000, and if the Merger is consummated, will be paid an additional fee of $75,000. In addition, FABI will reimburse Keefe, Bruyette & Woods, Inc. for all of its reasonable out-of-pocket disbursements and expenses and has extended to Keefe, Bruyette & Woods, Inc. indemnification arrangements usual in such engagements.

Effects of the Merger

If the Merger is consummated, holders of the Bank's common stock other than Virginia Bankshares will no longer have an equity interest in the Bank and will not share in its future earnings and growth to the extent there are earnings and growth. Instead, such holders will have the right to receive $42 cash for each share of the Bank's common stock held by them.

As a result of the Merger, the Bank would become a wholly-owned subsidiary of Virginia Bankshares. The Bank's common stock would no longer be traded in the over-the-counter market and the registration of the Bank's common stock under the Securities Exchange Act of 1934 (the "1934 Act") would terminate. As a consequence, the Bank no longer would file reports with the FDIC and would be relieved of the obligation to comply with the FDIC's proxy rules. Its officers, directors and 10% shareholders would be relieved of the reporting requirements and restrictions on insider trading imposed by Section 16 of the 1934 Act.

After the Effective Date of the Merger, the Bank's Board of Directors will consist of the members of the Board of Directors of the Bank immediately preceding

the Effective Date of the Merger and, similarly, the principal executive officers of the Bank will be the principal officers of the Bank immediately preceding such Effective Date.

Following the Effective Date of the Merger, the Bank will have an initial Board of Directors consisting of the 21 directors elected at the Annual Meeting. They will serve until the next annual meeting, which management expects to be held in April 1988, or until their successors are elected and qualify. No director has any interest in the Merger other than as a holder of the Bank's common stock and each director's holdings of such stock will be converted into the right to receive $42 cash per share in the same manner as all other public shareholders' shares will be converted. If the Merger is made effective, Virginia Bankshares expects to sell shares of its preferred stock to directors to permit compliance with the Virginia Banking Act, which requires a director of a Virginia bank to hold shares in the bank or its parent bank holding company with a par value of $1,000. Under provisions of the agreements that the Bank expects to enter into with the directors, each director will be obliged to resell the preferred shares for the original purchase price to Virginia Bankshares when each ceases to be a director.

Federal Income Tax Consequences

The conversion of shares of the Bank's common stock into the right to receive cash in the Merger will be treated as a taxable sale of stock for federal income tax purposes. Each shareholder whose stock is so converted will recognize any gain or loss realized. The amount of gain or loss realized by a shareholder will be the difference, if any, between the amount of cash to be received ($42 per share) and the cost or other tax basis of the shareholder's shares of the Bank's common stock. If the stock is held as a capital asset, the gain or loss generally

will be long-term if the shares have been held for more than six months and short-term if not held for more than six months on the Effective Date.

The foregoing discussion summarizes for general information the material federal income tax consequences of the Merger to shareholders other than Virginia Bankshares. The tax consequences to any particular shareholder may depend on the shareholder's circumstances. The Bank's shareholders are urged to consult their own tax advisers with regard to federal, state, and local tax consequences.

Consequences If The Merger Is Not Consummated

No significant changes in the Bank's business are contemplated if the Merger is not consummated.

Source of Financing

Financing the proposed Merger will require approximately $31,750,000 in cash to pay the public holders of all outstanding shares of the Bank's common stock for their shares.

The Bank anticipates that the required funds will be provided by FABI to Virginia Bankshares as a contribution to Virginia Bankshares capital. Such funds will be obtained by FABI from its working capital, which was increased in December 1986 by a $45,000,000 contribution to capital by First American Corporation, FABI's sole shareholder. It is not anticipated that any of the funds required to purchase shares will be borrowed.

THE PLAN OF MERGER

The Plan of Merger is set forth in full as *Appendix I*. Information contained in the narrative portion of this Proxy Statement with respect to the proposed transaction is a summary only, and reference is made to *Appendix I* for a complete account of the proposed Merger.

In brief, the Plan of Merger provides for the Merger of FAB Acquisition Bank, which is an "interim bank" organized by Virginia Bankshares solely to carry out the proposed Merger, into the Bank. At the Effective Date of the Merger, each outstanding share of the Bank's common stock, other than shares owned by Virginia Bankshares, will be converted into the right to receive $42 in cash, without interest, from Virginia Bankshares.

Approvals; Effective Date; and Resulting Bank

If the Plan is approved by the affirmative vote of the holders of more than two-thirds of the Bank's common stock entitled to vote, which the board expects to occur because Virginia Bankshares owns more than this number of shares and has indicated its intention to vote for the Plan of Merger, the Merger will become effective upon the filing of Articles of Merger with the Corporation Commission in accordance with Virginia law. The date and time of such filing is referred to herein as the "Effective Date of the Merger." On the Effective Date of the Merger, First American Bank of Virginia, as the Resulting Bank, will continue to own all of the business, property, assets, liabilities and obligations of the Bank.

The Merger requires the approval of the Corporation Commission and the FDIC. FAB Acquisition Bank must receive a certificate of authority to begin business as a bank from the Corporation Commission. Receipt of all such approvals is a prerequisite to the effectiveness of the Merger.

Exchange of Bank Common Stock for Cash

After the Effective Date of the Merger, each holder of outstanding certificates representing the Bank's common stock, other than Virginia Bankshares, upon surrender of the certificates to the Bank, will be entitled to receive therefor the amount of cash into which his shares have been converted by virtue of the Merger. Until such surrender, each outstanding certificate representing the Bank's common stock will be deemed no longer outstanding and will represent only the right to receive $42 per share of common stock held. Cash to be issued to former holders of the Bank's common stock shall be deemed in full satisfaction of all rights appertaining to the Bank's common stock, and after the Effective Date of the Merger, no further dividends will be paid on the Bank's common stock.

Conditions to Merger

The Merger will not occur unless each of the conditions to its effectiveness has been met or waived by the party for whose benefit such condition shall have been given. The principal conditions in the Plan of Merger are that the Plan of Merger shall have been approved by holders of more than two-thirds of the shares of the Bank's common stock entitled to vote, and the approval of the Merger by regulatory authorities having jurisdiction.

Termination of the Plan of Merger

The Plan of Merger will terminate unless all conditions are satisfied and the Effective Date occurs on or before September 30, 1987, and prior thereto upon the disapproval of any regulatory agency having jurisdiction.

Operation of the Business of the Bank

The business conducted by the Bank prior to consummation of the Merger will be continued thereafter by the Resulting Bank.

Board of Directors and Management of the Resulting Bank

The Board of Directors of the Bank as comprised prior to the Effective Date of the Merger will continue to serve as the Board of Directors of the Resulting Bank

and, similarly, the executive officers of the Bank prior to the Effective Date of the Merger will continue to serve as such executive officers after the Effective Date of the Merger.

BUSINESS OF THE BANK

General

The Bank was formed in 1978 by the merger of Clarendon Bank & Trust Company, Alexandria National Bank of Northern Virginia, and Arlington Trust Company, Incorporated under the charter of Arlington Trust and with the title of First American Bank of Virginia.

In 1983, four banks that were majority-owned subsidiaries of Virginia Bankshares (The First National Bank of Lexington, The Peoples National Bank of Leesburg, Shenandoah Valley National Bank and Valley Bank), and First Peninsula Bank and Trust Company were merged into the Bank in exchange for a combination of cash (in the case of First Peninsula) and stock of the Bank (in the case of the four other banks).

In 1984, Round Hill National Bank, which was a majority owned subsidiary of Virginia Bankshares, was merged into the Bank in exchange for stock of the Bank.

As a result of the expansion of its business since 1983, the Bank now serves 18 communities in Northern Virginia, Hampton Roads, Loudoun County and the Shenandoah Valley. Headquartered in McLean, the Bank, which has 1,726 employees, provides financial services to individuals, businesses and governmental units through 101 branch offices. On December 31, 1986 the Bank had total assets of $2,849 million, deposits of $2,465 million, loans net of unearned income of $1,835 million and equity capital of $163 million.

The Bank's services include checking, savings and time deposit accounts offered to individual, business, public and institutional customers; industrial, commercial, consumer, real estate and agricultural loans; international

banking services; processing of collections; and trust services. The trust department had approximately $1,014 million of assets under management as of December 31, 1986. The Bank also provides access for its customers to "MONEY EXCHANGE" (R) automated teller machines located in Virginia, Maryland, and the District of Columbia.

The following ratios are furnished for each of the three fiscal years indicated.

	1986	1985	1984
Net income to average equity capital accounts	16.45%	16.39%	15.01%
Net income to average daily total deposits	1.13%	1.13%	1.07%
Average daily loans to average daily deposits	76.25%	74.60%	65.96%

The markets served by the Bank are highly competitive. Approximately 143 other banks with over 1,653 branches operate in these markets. Several of these competing banks have statewide operations in Virginia. In addition, savings and loan institutions or branches of such institutions, credit unions, finance companies and other competitors or potential competitors operate in the Bank's service areas. The Bank estimates that it has nearly 13.4% of total commercial bank deposits in the Northern Virginia market, 3.2% in Hampton roads, 19.8% in Loudoun County, and 11.6% in the Shenandoah Valley.

The Bank does not believe that a material part of its business is dependent upon a single customer or a few customers, the loss of any one or more of whom would have a materially adverse effect on its business.

The Bank is not a party to any material legal proceedings, other than those arising out of the ordinary course of its business.

Properties

The main offices of the Bank are located in a modern office building owned by the Bank and located at 1970 Chain Bridge Road, McLean, Virginia. The Bank owns 36 and leases 65 banking offices.

The Bank considers all of the properties owned or leased by it to be suitable and adequate for their intended purposes.

Pro Forma Capitalization

The following table sets forth the capitalization of the Bank as of December 31, 1986 and the pro forma capitalization of the Bank assuming the Merger was effective December 31, 1986. The Merger will be accounted for as a purchase on the books of Virginia Bankshares. The following table shows no adjustments in the shareholders' equity because the purchase is between shareholders—namely, Virginia Bankshares and the remaining 15% of the Bank's shareholders.

December 31, 1986
(Unaudited in thousands)

	Existing	Adjustments	Pro Forma
Long Term Debt:			
6% Capital Notes due 1993	$ 1,500	-0-	$ 1,500
6% Capital Notes due 1987	63	-0-	63
Total Long Term Debt	$ 1,563	-0-	$ 1,563
Shareholders' Equity:			
Common Stock, authorized 10,000,000 shares, outstanding 4,896,287 shares	48,963	-0-	48,963
Surplus	22,132	-0-	22,132
Retained Earnings	91,955	-0-	91,955
Total Shareholders' Equity	163,050	-0-	163,050
Total Long Term Debt and Shareholders' Equity	$164,613		$164,613

Per Share Data

The following tabulation presents historical per share data for the Bank. Pro forma combined per share data for the Resulting Bank are omitted as the Merger does not affect the information. Such data are based on historical financial statements for the Bank appearing elsewhere in this Proxy Statement. The data have been adjusted for stock splits and stock dividends.

	Years Ended December 31,				
	1986	1985	1984	1983	1982
Historical Earnings Per Common Share:					
Net Income	$ 5.10	$ 4.48	$ 3.67	$ 3.64	$ 2.95
Cash Dividends Declared Per Common Share:	$ 1.20	$ 1.20	$ 1.20	$ 1.13	$ .95
Book Value Per Common Shares (Period End):	$33.30	$29.42	$26.14	$24.41	$21.95

Recent Market Prices; Dividend History

The Bank's common stock is traded in the over-the-counter market. The following table sets forth for the periods indicated the prices per share and the amount of cash dividends per share by quarters for 1985, 1986, and 1987.

			Dividends Per Share
	1987		
Two Months Ending	Sales *		
	High	Low	
February 28	$39	$32	$.30 per quarter
	1986		
Quarter Ended	Sales *		
	High	Low	
March 31	$31	$31	$.30 per quarter
June 30	32	32	
September 30	32	32	
December 31	32	32	
	1985		
Quarter Ended	Bid/Sales *	Asked	
	High Low	High Low	
March 31	$30 $30	$33 $33	$.30 per quarter
June 30	30 30	N/A N/A	
September 30	30 30	N/A N/A	
December 31	31 31	N/A N/A	

* NASDAQ revised its method of reporting stock prices on April 1, 1985 to report only high and low sales prices.

Description of Bank Common Stock

The Bank has authorized capital stock consisting of 10 million shares of common stock. Each share of common stock is entitled to one vote in person or by proxy on all matters referred to shareholders and the right to receive pro rata such dividends as may be declared by the Board of Directors from time to time out of funds legally available therefor.

Holders of common stock have no liability except for unpaid subscriptions to common stock. In the event of the liquidation of the Bank, holders of Bank's common stock would share pro rata in all assets remaining after provision for liabilities as provided by the Virginia Stock Corporation Act. The Bank's common stock has no conversion rights, no provision for redemption, no sinking

fund rights, no preemptive rights and no cumulative voting rights.

Financial Statements

The Balance Sheets at December 31, 1986 and 1985 and the related Statements of Income, Statements of Changes in Shareholders Investment and Statements of Changes in Financial Position of the Bank for each of the three years in the period ended December 31, 1986, the Notes to Financial Statements, and the Report dated January 29, 1987 of Arthur Andersen & Co., independent public accountants, on the examination of such financial statements, the Financial Review, the Analysis of Interest Income and Selected Inflation Data, all included in the 1986 Annual Report to Shareholders enclosed with this Proxy Statement, are incorporated by reference herein. *See Appendix II.*

Current Information

The Bank is subject to the information requirements of the 1934 Act, and in accordance therewith files reports, proxy statements and other documents and information with the FDIC. The Bank's officers, directors and principal shareholders are also presently subject to certain filing requirements, as well as certain trading restrictions, imposed by the 1934 Act. Such reports, proxy statements and other documents and information are available for inspection and copying at the FDIC, 550 17th Street, N.W., Washington, D.C. 20429.

Proposals for 1988 Annual Meeting of Stockholders of The Bank

In the event the Merger is not consummated, shareholder proposals for the 1988 Annual Meeting of Shareholders of the Bank must be received by the Secretary of the Bank at 1970 Chain Bridge Road, McLean, Virginia 22102, no later than December 23, 1987, for inclusion in

the Proxy Statement for the 1988 Annual Meeting of Shareholders.

Cost of Solicitation of Proxies

The cost of the solicitation of proxies by the management will be borne by the Bank. In addition to the use of the mails, proxies may be solicited personally or by telephone by officers and regular employees of the Bank. The Bank does not expect to pay any compensation for the solicitation of proxies.

Relationship of The Bank with Independent Public Accountants

The Bank selected an independent public accountant, Arthur Andersen & Co., to audit the Bank's books for the year 1986, and it is expected that Arthur Andersen & Co. will serve in that capacity for the year 1987. It is not expected that a representative of the accounting firm will be present at the annual meeting of First American.

In 1986 Arthur Andersen & Co. performed a variety of professional services for The Bank including an audit and tax consultation.

There was no formal approval by the Board of Directors' Audit Committee nor consideration given as to the possible effect on the independence of the accountant prior to the professional services being rendered by Arthur Andersen & Co.

Annual Report of The Bank

ANY SHAREHOLDER OF THE BANK FROM WHOM PROXIES FOR THIS MEETING ARE SOLICITED MAY OBTAIN FROM THE BANK, WITHOUT CHARGE, A COPY OF ITS ANNUAL REPORT TO THE FEDERAL DEPOSIT INSURANCE CORPORATION ON FORM F-2 FOR THE FISCAL YEAR ENDED DECEMBER 31, 1986, INCLUDING THE FINANCIAL STATEMENTS THEREIN AND THE RELATED SCHEDULES, BY WRITTEN REQUEST ADDRESSED TO ERIC W. ERDOSSY, PRESIDENT AND CHIEF ADMINISTRATIVE OFFICER, FIRST AMERICAN BANK OF VIRGINIA, 1970 CHAIN BRIDGE ROAD, McLEAN, VIRGINIA 22102. ANY SUCH REQUEST FROM A BENEFICIAL OWNER OF STOCK NOT REGISTERED IN HIS NAME MUST CONFIRM THAT HE WAS A BENEFICIAL OWNER OF SUCH STOCK ON MARCH 6, 1987.

BY ORDER OF THE BOARD OF DIRECTORS
FIRST AMERICAN BANK OF VIRGINIA

/s/ Milton L. Drewer, Jr.
MILTON L. DREWER, JR.
Chairman of the Board and
Chief Executive Officer

Appendix Index

Appendix I —Agreement and Plan of Merger dated February 12, 1987.

Appendix II —The Bank's financial statements for the years ended December 31, 1986 and 1985 (audited); these statements are included in the Bank's Annual Report, a copy of which is furnished herewith.

Appendix III—Opinion Letter of Keefe, Bruyette, & Woods, Inc.

1/10/87

AGREEMENT AND PLAN OF MERGER OF FAB ACQUISITION BANK INTO FIRST AMERICAN BANK OF VIRGINIA

Agreement and Plan of Merger dated as of February 12, 1987, by and among Virginia Bankshares, Inc., a Virginia bank holding company ("Virginia Bankshares"), FAB Acquisition Bank, a Virginia banking corporation ("FAB"), and First American Bank of Virginia, a Virginia banking corporation ("First American"), FAB and First American being herein sometimes together called the "Constituent Corporations."

WHEREAS, FAB is a corporation duly organized and existing under the laws of the Commonwealth of Virginia, having 100,000 shares of authorized Common Stock ("FAB Common Stock"), of which on the date of this Agreement and Plan of Merger, 100,000 shares were issued and outstanding and were owned by Virginia Bankshares; and

WHEREAS, First American is a corporation duly organized and existing under the laws of the State of Virginia, having 10,000,000 shares of authorized Common Stock ("First American Common Stock") of which on the date of this Agreement and Plan of Merger, 4,896,287 shares were issued and outstanding; and

WHEREAS, the boards of directors of the Constituent Corporations deem it advisable that such corporations merge;

NOW, THEREFORE, in consideration of the premises and of the mutual agreements and covenants herein contained, it is planned, subject to satisfaction of the terms and conditions hereof, that FAB shall be merged into First American, that First American, a Virginia corporation, shall be the resulting bank (the "Resulting Bank"), and that the terms and conditions of such mer-

ger (the "Merger"), the plan and mode of carrying the same into effect, and the manner and basis of converting the shares of the Constituent Corporations, shall be as hereinafter set forth:

1. *Terms, Conditions and Effective Date of Merger.*

1.1 Following adoption of this Agreement and Plan of Merger by the boards of directors of the respective Constituent Corporations and its approval by shareholders of the respective Constituent Corporations as provided by law, the parties hereto shall, except as hereinafter provided, cause Articles of Merger, duly prepared and executed in accordance with the Virginia Stock Corporation Act, to be filed with the State Corporation Commission of Virginia. The separate existence of FAB shall cease as of the close of business on the Effective Date (as hereinafter defined) and FAB shall thereupon be merged into First American.

1.2 The Effective Date shall be the date when, after Articles of Merger shall have been accepted for recording, the State Corporation Commission of Virginia shall issue a Certificate of Merger.

2. *Conversion and Cancellation of Shares*

2.1 The manner and basis of converting, cancelling, or exchanging shares of capital stock of the Constituent Corporations on the Effective Date shall be as follows:

(a) Each share of FAB Common Stock issued and outstanding on the Effective Date shall be cancelled and no new shares or other securities, obligations or cash will be issuable with respect thereto.

(b) Each share of First American Common Stock issued and outstanding on the Effective Date, other than shares of First American Common Stock owned by Virginia Bankshares, shall be converted into the right to receive $42 in cash from Virginia Bankshares.

(c) Each share of First American Common Stock owned by Virginia Bankshares shall be converted into one share of common stock of the Resulting Bank.

(d) As soon as practicable after the Effective Date, First American as Exchange Agent will send a notice and transmittal form to each holder, other than Virginia Bankshares, of a certificate that represented shares of First American Common Stock immediately prior to the Merger, advising such holder of the terms of the exchange effected by the Merger and the procedure for surrendering to the Exchange Agent such certificate for exchange into cash.

(e) Each holder of shares of First American Common Stock other than Virginia Bankshares who shall have delivered his certificate representing such shares to First American as Exchange Agent shall receive a check in the appropriate amount (without interest) from the Exchange Agent.

3. *Articles of Incorporation, By-laws and Directors of the Resulting Bank.*

3.1 On the Effective Date, there shall be no change in the Articles of Incorporation (except any change caused by the filing of Articles of Merger relating to the Merger), By-laws or Board of Directors of the Resulting Bank.

4. *Conditions to the Merger*

4.1 Consummation of the Merger is subject to satisfaction of the following conditions:

(a) The approving vote of the holders of more than two-thirds of the outstanding shares of First American Common Stock at a meeting called and held as provided by Virginia law.

(b) The approving vote of the holder of the outstanding shares of FAB Common Stock in accordance with Virginia law.

(c) The approval of the Merger by the State Corporation Commission of Virginia and the Federal Deposit Insurance Corporation.

5. *Effect of the Merger*

5.1 The Merger, upon the Effective Date, shall have the effect provided for by Section 13.1-721 of the Code of Virginia.

6. *Termination*

6.1 This Agreement and Plan of Merger shall automatically terminate if the Merger has not become effective by September 30, 1987.

WITNESS the following signatures as of the date first above written.

VIRGINIA BANKSHARES, INC.

By /s/ Jack W. Beddow
President

FAB ACQUISITION BANK

By /s/ Milton L. Drewer, Jr.
President

FIRST AMERICAN BANK OF VIRGINIA

By /s/ Milton L. Drewer, Jr.
Chairman of the Board

/s/ Milton V. Peterson

/s/ Sidney O. Dewberry

/s/ Donald R. Maxfield

/s/ Thomas B. Chamberlin

/s/ Henry A. Thomas

/s/ Thomas G. Mays

/s/ Charles T. Lindsay, Jr.

/s/ Glenn W. Saunders, Jr.

/s/ Linda H. Michael

/s/ Charles H. Smith, Jr.

/s/ Verlin W. Smith

/s/ Emanual A. Baker, Jr.

/s/ Eric W. Erdossy

/s/ Joel T. Broyhill

/s/ Harriet F. Bradley

/s/ George W. Johnson

/s/ Jack W. Beddow

/s/ Milton L. Drewer, Jr.

KEEFE, BRUYETTE & WOODS, INC.

Specialists in Banking

Two World Trade Center—New York, N.Y. 10048

January 12, 1987

Mr. Robert G. Stevens
President and Chief Executive Officer
First American Bankshares, Inc.
15th and H Streets, N.W.
Washington, D.C. 20005

Dear Mr. Stevens:

You have requested our opinion as to the value to be ascribed to the approximately 15% of the shares of First American Bank of Virginia (the "Bank") not currently owned by First American Bankshares, Inc. (the "Company"). It is our understanding that the Company wishes to consider making a cash offer to purchase these remaining shares of the Bank.

Keefe, Bruyette & Woods, Inc., as part of its investment banking business, is continually engaged in the valuation of commercial bank securities in connection with mergers and acquisitions, negotiated underwritings, secondary distributions of listed and unlisted securities, private placements and valuations for various other purposes. As specialists in the securities of commercial banks and bank holding companies, we have experience in, and knowledge of, the Virginia banking market and of the major banking companies operating in that market. In carrying out our assignment we have reviewed material bearing upon the financial and operating condition of the Bank, including, among other things: (i) the Subscription Offering dated February 13, 1986; (ii) certain publicly available information for the Bank, including annual reports for 1984 and 1985; (iii) other financial information concerning the business and operations of the Bank, for purposes of

our analysis; (iv) other internal information relating to the Bank furnished to us by the Company for purposes of our analysis; (v) certain information concerning the trading of, and the trading market for, the common stock of the Bank; and (vi) certain publicly available information with respect to certain other banks and bank holding companies and the nature and terms of certain other transactions that we consider relevant to our inquiry.

In conducting our review and arriving at our opinion, we have relied upon and assumed the accuracy and completeness of the publicly available information concerning the Bank and all additional information concerning the Bank provided to us and we have not attempted independently to verify such information.

We have considered such financial and other factors as we deemed appropriate under the circumstances, including, among others, the following: (i) the historical and current financial position and results of operations of the Bank, including interest income, interest expense, net interest income, the net interest margin, non-interest income, non-interest expense, earnings, loan loss reserve levels, the provision for loan losses, net charge-offs, dividends, internal capital generation, book value, intangible assets, return on assets, return on stockholders' equity and capitalization; (ii) the assets and liabilities of the Bank, including the loan, investment, and mortgage portfolios, deposits and other liabilities; and (iii) the historical and current market data for the Bank. We have also taken into account our assessment of general economic, market and financial conditions and our experience in other transactions, as well as our experience in securities valuation and our knowledge of the banking industry generally. Our opinion necessarily is based upon conditions as they exist on, and can be evaluated as of, the date of this letter.

Based upon and subject to the foregoing, we are of the opinion that $42 per share represents a fair price for the

shares of First American Bank of Virginia not currently owned by the Company.

Very truly yours,

KEEFE, BRUYETTE & WOODS, INC.

By /s/ Michael C. Connor
MICHAEL C. CONNOR
Senior Vice President

APPENDIX F

Securities Exchange Act of 1934, Section 14(a), 15 U.S.C. § 78n(a)—It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 78*l* of this title.

12 C.F.R. § 335.206(a)—No solicitation or communication subject to this Subpart B shall be made by means of any statement, form of proxy, notice of meeting, or other communication, written or oral, containing any statement that, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or that omits to state any material fact necessary in order to make the statement therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter that has become false or misleading . . . .

Supreme Court, U.S.
FILED
APR 3 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1448

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

VIRGINIA BANKSHARES, INC., *et al.*,
Petitioners,

v.

DORIS I. SANDBERG,
Respondent.

FIRST AMERICAN BANK OF VIRGINIA, INC., *et al.*,
Petitioners,

v.

PAUL H. WEINSTEIN, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF IN OPPOSITION

JOSEPH M. HASSETT *
JOHN C. KEENEY, JR.
GEORGE H. MERNICK, III
DAVID G. LEITCH
ALBERT W. TURNBULL
HOGAN & HARTSON
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5643

* Counsel of Record

Counsel for Respondents

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly held that the evidence supported the verdict that the proxy statement contained material misstatements of fact.

2. Whether this Court should decide the causation question left undecided in *Mills* v. *Electric Auto-Lite Co.* despite the fact that petitioners waived the issue, the Court of Appeals did not reach it, there is no conflict in the circuits, and the evidence supported the jury's verdict of causation pursuant to unobjected-to instructions.

3. Whether this Court should review the decision of the Court of Appeals that petitioners waived the third of the questions they seek to present.

4. Whether (a) the Court of Appeals correctly held that petitioners waived the third argument asserted here, and, if the argument was not waived, whether (b) the Court of Appeals properly upheld the verdict.

PARTIES TO THE PROCEEDINGS

Respondents adopt the statement of parties to the proceedings found in the Petition and, pursuant to Supreme Court Rule 29.1, state that no corporate respondent has any parent companies or subsidiaries other than wholly owned subsidiaries.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES v

COUNTERSTATEMENT 1

REASONS FOR DENYING THE WRIT 9

I. THE COURT OF APPEALS CORRECTLY HELD THAT THE EVIDENCE SHOWED MISSTATEMENTS OF FACT THAT WERE PROPERLY SUBMITTED TO THE JURY 12

A. The Proxy Statement Falsely Represented That The Board Approved The Merger Because It Offered Minority Stockholders An Opportunity To Achieve A High Value For Their Shares When, As A Matter Of Fact, No Such Determination Had Been Made 12

B. The Proxy Statement Falsely Represented That The Board Relied On An Independent Determination Of The Value Of The Stock When, As A Matter Of Fact, It Did Not 16

II. PETITIONERS CONCEDED THE CAUSATION ISSUE LEFT OPEN IN *MILLS* v. *ELECTRIC AUTO-LITE CO.* AND, IN ANY EVENT, THE JURY'S VERDICT OF CAUSATION WAS SUPPORTED BY THE EVIDENCE 18

A. Petitioners Waived The Question Left Open In *Mills* Both By Admitting That The Proxy Statement Was An Essential Link In The Transaction And By Failing To Object To The Jury Instruction On That Point 18

B. The Evidence Supported The Jury's Verdict That The Proxy Statement Was An Essential Link In The Transaction That Caused Respondents' Injury 21

TABLE OF CONTENTS—Continued

	Page
C. There Is No Need For This Court To Revisit The Causation Question Left Open In *Mills*, Even If It Had Been Presented Below	22
D. The Rule 10b-5 Question Argued By Petitioners Is Not Presented By This Case	24
III. THE COURT OF APPEALS CORRECTLY HELD THAT PETITIONERS WAIVED ANY CLAIM OF ERROR IN THE SUBMISSION OF SEVERAL RELATED MISREPRESENTATIONS TO THE JURY UNDER A SINGLE COUNT AND, IN ANY EVENT, ITS ALTERNATIVE HOLDING THAT THERE WAS NO ERROR IS CORRECT	26
A. The Determination By The Court Of Appeals That Petitioners Waived The Claimed Error Does Not Present An Issue Worthy Of This Court's Consideration	27
B. In Any Event, The Fourth Circuit's Disposition Of This Issue Follows This Court's Decisions	28
CONCLUSION	30

TABLE OF AUTHORITIES

CASES:	Page
Basic, Inc. v. *Levinson*, 485 U.S. 224 (1988)	25
Berg v. *First American Bankshares, Inc.*, 796 F.2d 489 (D.C. Cir. 1986)	13, 14
Biesenbach v. *Guenther*, 588 F.2d 400 (3d Cir. 1978)	15
Broehm v. *Ortho Pharmaceutical Corp.*, 642 F.2d 652 (1st Cir. 1981)	29
Carden v. *Arkoma Associates*, 110 S. Ct. 1015 (1990)	20
City of Canton v. *Harris*, 109 S. Ct. 1197 (1989)	20
Clayton v. *Skelly Oil Co.*, [1977-1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,269 (S.D.N.Y. 1977)	24
Cole v. *Schenley Industries*, 563 F.2d 35 (2d Cir. 1977)	24
Dataprobe Acquisition Corp. v. *Datatab, Inc.*, 722 F.2d 1 (2d Cir. 1983), *cert. denied*, 465 U.S. 1052 (1984)	13, 14
Dudley v. *Dittmer*, 795 F.2d 669 (8th Cir. 1986)	29
EEOC v. *Federal Labor Relations Authority*, 476 U.S. 19 (1986)	20
Efros v. *Nationwide Corp.*, [1982-1983 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 99,077 (S.D. Ohio 1983)	24
Ermar Oil Corp. v. *Getty Oil Co.*, [1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,358 (C.D. Cal. 1978)	24
FTC v. *Grolier Inc.*, 462 U.S. 19 (1983)	21
Galloway v. *United States*, 319 U.S. 372 (1943)	2
General Motors Overseas Operations Division of General Motors Corp. v. *The Lichtenstein*, 126 F. Supp. 395 (S.D.N.Y. 1954)	29
Gill v. *Rollins Protective Services Co.*, 722 F.2d 55 (4th Cir. 1983)	29
Golub v. *PPD Corp.*, 576 F.2d 759 (8th Cir. 1978)	15
Gould v. *American Hawaiian Steamship Co.*, 319 F. Supp. 795 (D. Del. 1970)	30
Graver & Mfg. Co. v. *Linde Air Products Co.*, 336 U.S. 271 (1949)	10

TABLE OF AUTHORITIES—Continued

	Page
Herskowitz v. *Nutri/System, Inc.*, 857 F.2d 179 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 1315 (1989)	17
Heyman v. *Heyman*, 356 F. Supp. 958 (S.D.N.Y. 1973)	23
Kadamian v. *Ladish*, 792 F.2d 614 (7th Cir. 1986)	15
Kas v. *Financial General Bankshares, Inc.*, 796 F.2d 508 (D.C. Cir. 1986)	15
Laurenzano v. *Einbender*, 264 F. Supp. 356 (E.D. N.Y. 1966)	23
Lavender v. *Kurn*, 327 U.S. 645 (1946)	10, 14
Lockspeiser v. *Western Maryland Co.*, 768 F.2d 558 (4th Cir. 1985)	24
Madison Consultants v. *FDIC*, 710 F.2d 57 (2d Cir. 1983)	25, 26
McMurray v. *Deere & Co.*, 858 F.2d 1436 (10th Cir. 1988)	29
Mills v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970)	*passim*
Radol v. *Thomas*, 534 F. Supp. 1302 (S.D. Ohio 1982), *aff'd on other grounds*, 772 F.2d 244 (6th Cir. 1985)	17
Rice v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955)	12
Santa Fe Industries v. *Green*, 430 U.S. 462 (1977)	15, 25
Schlick v. *Penn-Dixie Cement Corp.*, 507 F.2d 374 (2d Cir. 1974), *cert. denied*, 421 U.S. 976 (1975)	23
SEC v. *C.R. Richmond & Co.*, 565 F.2d 1101 (9th Cir. 1977)	30
Selk v. *St. Paul Ammonia Products, Inc.*, 597 F.2d 635 (8th Cir. 1979)	24
Smillie v. *Park Chemical Co.*, [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,891 (E.D. Mich. 1979)	24
Springfield v. *Kibbe*, 480 U.S. 257 (1987)	28
Stedman v. *Storer*, 308 F. Supp. 881 (S.D.N.Y. 1969)	15

TABLE OF AUTHORITIES—Continued

	Page
Sunkist Growers, Inc. v. *Winckler & Smith Citrus Products Co.*, 370 U.S. 19 (1962)	29
TSC Industries v. *Northway, Inc.*, 426 U.S. 438 (1976)	10, 12, 29, 30
United Pilots Ass'n v. *Halecki*, 358 U.S. 613 (1959)	29
United States v. *Johnston*, 268 U.S. 220 (1925)	10
United States v. *Margala*, 662 F.2d 622 (9th Cir. 1981)	26
Wilmington Star Mining Co. v. Fulton, 205 U.S. 60 (1907)	28, 29
Yentsch v. *Texaco, Inc.*, 630 F.2d 46 (2d Cir. 1980)	29
STATUTES, RULES AND REGULATIONS:	
15 U.S.C. § 78n(a)	*passim*
Fed. R. Civ. P. 8(e)(2)	29
Fed. R. Civ. P. 10(b)	29
Fed. R. Civ. P. 23	11
Fed. R. Civ. P. 51	20, 27, 28
Va. Code Ann. § 13.1-692.1	7
Va. Code Ann. § 13.1-718(B)(1)	3, 12, 22
12 C.F.R. § 335.212, Item 14(a)	12
17 C.F.R. § 240.10b-5	24, 25
MISCELLANEOUS:	
H. Bloomenthal, *Securities and Federal Corporate Law* (rev. ed. 1990)	23
Folk, *Corporation Law Developments—1969*, 56 Va. L. Rev. 755 (1970)	19
Note, *Loss and Transaction Causation: The Second Circuit Resolves the Causation Controversy in Majority Control Situations*, 22 Wash. & Lee L. Rev. 683 (1975)	19
R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* (6th ed. 1986)	10, 11
C. Wright & A. Miller, *Federal Practice and Procedure*	29

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1448

VIRGINIA BANKSHARES, INC., *et al.*,
Petitioners,

v.

DORIS I. SANDBERG,
Respondent.

FIRST AMERICAN BANK OF VIRGINIA, INC., *et al.*,
Petitioners,

v.

PAUL H. WEINSTEIN, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF IN OPPOSITION

Respondents Doris I. Sandberg and Paul H. Weinstein, *et al.*, (collectively, "respondents") respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the Fourth Circuit's decision in these cases.

COUNTERSTATEMENT

Preliminary Statement

None of the three questions argued by petitioners is fairly presented by these cases because none is based on

the *facts* as found by the jury and affirmed by the Fourth Circuit. Contrary to the requirement that the evidence be considered in the light most favorable to the jury's verdict, *see, e.g., Galloway* v. *United States*, 319 U.S. 372, 395 (1943), petitioners' arguments ignore, misstate, or gloss over the evidence accepted by the jury and rely, instead, on factual contentions advanced by petitioners in the trial court and rejected by the jury. Additionally, petitioners' arguments to this Court depart markedly from the positions petitioners urged below, and represent an effort to raise for the first time questions long since waived. Accordingly, respondents' counterstatement of the case is based on the evidence credited by the jury and the issues actually presented to and addressed by the courts below.

Counterstatement of the Case

The Freeze-Out Merger. These cases arise from the efforts of First American Bankshares, Inc. ("FABI"), to eliminate all minority stock interest in First American Bank of Virginia ("the Bank") and acquire for itself the 15% of the Bank's stock it did not already own. Pet. App. 5a.[1] FABI's desire to acquire the minority's stock was based upon a memorandum by its Treasurer showing that the acquisition would significantly increase FABI's earnings and would be profitable if FABI paid $61 a share. JA 1167-69. Although, as the jury found, the minority stock was worth $60 a share, Pet. App. 19a, FABI sought to acquire the stock at $42 a share in a so-called "freeze-out" merger in which FABI, through its wholly owned subsidiary Virginia Bankshares, Inc. ("VBI"), received all of the stock of the Bank and the stock of the minority was converted into a right to receive $42 per share in cash from VBI. JA 692-94, 701-02, 631-32, 646, 1330.

[1] "Pet. App." refers to the Appendix to the Petition for Writ of Certiorari; "JA" refers to the Joint Appendix in the Fourth Circuit.

The Need For A Proxy Statement. Although FABI's ownership of 85% of the Bank's stock was sufficient for stockholder approval of a merger, the merger could not occur unless the Bank's directors issued a proxy statement recommending the plan of merger and called a stockholders' meeting to vote on the merger. Va. Code Ann. § 13.1-718(B)(1); *see* Pet. App. 5a. FABI wanted widespread stockholder support for the merger because it did not want a repeat of the situation that had occurred with its Maryland subsidiary a year earlier. JA 461. There, FABI's proposed freeze-out merger was not consummated because of minority stockholder opposition to FABI's price. The board of the Maryland subsidiary, relying on an independent financial advisor, determined that FABI's price was unfairly low. JA 932, 901. That board did not recommend the merger and FABI was ultimately forced to increase its price by forty percent. JA 853-54.

Thus, in the Virginia transaction at issue here, FABI set out to ensure that the public "would respond favorably to [the $42] price," JA 703-704, and FABI's chairman told the Bank's chairman that the transaction would have to be approved not only by the Bank's board of directors but "would have to go to the stockholders in order for their approval as well." JA 724.

FABI Drafts The Fictional Proxy Statement. The principal responsibility for securing public stockholder approval for the merger at FABI's $42 price was assigned to VBI's President Jack Beddow, who was also an officer and director of FABI and a director of the Bank. JA 695, 927-29. Beddow's first step was to ask *FABI's* counsel to prepare *for FABI* a proxy statement to be issued *by the board of the Bank*—the party on the other side of the transaction—stating that the *Bank's* board had approved and was recommending to minority stockholders a merger in which FABI would acquire all of the minority's stock. JA 800-01, 931. The proxy state-

ment drafted by FABI addressed the two obstacles that had thwarted FABI's efforts with the sister subsidiary. Addressing first the Maryland board's determination that the price was unfairly low, this proxy statement recited that the Bank's directors had voted for and were recommending the merger to stockholders "because it provides an opportunity for the [Bank's] public shareholders to achieve a high value for their shares." JA 1208. No such vote or recommendation had occurred; the Bank's directors did not even learn of the merger until six months later. JA 722-23.

Second, to avert the Maryland experience of the subsidiary board's retention of an independent financial advisor, FABI's draft of the proxy statement it wanted the Bank to issue represented that the price had been determined to be fair to minority stockholders by an independent investment banker. JA 1209. However, even as it was drafting that proxy statement, FABI decided that this time *it* would hire a financial advisor to give an opinion that the $42 price FABI wanted to pay was fair, and then falsely represent that the $42 price was the product of an "independent analysis" by the investment banker. JA 697, 704, 932.

FABI knew that telling an investment banker the price it wanted to pay would compromise the investment banker's independence. JA 676-77. Nonetheless, Beddow told Keefe, Bruyette & Woods ("KBW") FABI's price, and asked if KBW would furnish an opinion that such price was fair. JA 839-40. KBW was willing to give the opinion on the condition that FABI pay $25,000 for the opinion letter and a $75,000 bonus if it succeeded in acquiring the minority stock at the price it wanted to pay. FABI agreed. JA 1170-1173, and KBW issued the opinion letter. Pet. App. 74a-76a.

The opinion letter did not state the basis for its conclusion. Evidence at trial revealed that the letter was not based on an independent analysis of the inherent

value of the stock but was simply the product of KBW's willingness to endorse any price FABI chose above the $32 "market" price, even though KBW recognized that the so-called "market" was a thin one dominated by FABI. JA 980, 991, 810-13, 1182, and that the minority stockholders were not selling into that "market" but were being forced to surrender their shares to FABI. JA 980.

The Bank's Directors Approve The Proxy Statement Without Reviewing It. Through arrangements made by Beddow, KBW made a presentation to a small group of the Bank's directors and stockholders on January 29, 1987. Pet. App. 6a. After Beddow told the group that FABI would not pay more than $42 per share even if an independent advisor concluded that $42 was an unfairly low price, JA 846, 942-43, the group decided not to retain an independent advisor to determine the fair value of the minority-held stock. Pet. App. 6a; *see* JA 1018. The group then drafted a two-sentence statement recommending that the board of directors accept FABI's $42 per share offer. Pet. App. 6a.

At a meeting held on February 12, 1987, the Bank's board adopted resolutions approving the merger and recommending to the minority stockholders that they vote in favor of the $42 per share offer. *Id.* Directors admitted at trial that the reason the board approved the merger was that the directors thought they had no choice and would be removed from the Bank's board by FABI if they did not. JA 851-82, 863, 874-75.

At the February 12, 1987 meeting, the directors also adopted resolutions prepared by FABI's counsel which recited that the Bank directors approved issuance of a proxy statement presented to the meeting. JA 1188-89. In fact, no proxy statement was presented to the meeting. JA 771. Instead, the fictional proxy statement which bore no relation to the actual transaction, JA 805-06, and had been prepared by FABI's counsel, was

sent to stockholders without review or approval by the Bank's board of directors. JA 771-72, 805-06.

The Proxy Statement. The proxy statement issued in the name of the Bank's board repeated the two factual representations described above. These representations were pure fictions when drafted and never became fact. First, despite the facts that the Bank's directors had not determined that the $42 price was a high one, and had approved the merger because they thought they would be replaced if they did not, the proxy statement repeated verbatim the fiction that the Bank's board had approved the merger because it provided an opportunity for minority stockholders to achieve a high value for their shares. Pet. App. 15a; *see* JA 1246, 1208. Second, despite the fact that the Bank's directors had specifically decided not to retain an independent investment banker, and although KBW had not acted independently, the proxy statement represented that KBW's opinion letter was an independent determination as to the fairness of the $42 price. Pet. App. 16a.

This Litigation. After consummation of the freeze-out at $42 per share, respondent Sandberg brought a class action, alleging in Count I that petitioners had violated Section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(a), and, in Count II, that they had breached fiduciary duties under Virginia law. The complaint alleged that the proxy statement was an essential link in the merger transaction and that it omitted and misstated material facts. JA 72-75. Petitioners admitted by answer that the proxy statement was an essential link in the transaction and that "the shareholders were entitled to . . . receive complete, accurate proxy materials . . . ." JA 343.

Class certification having been denied, the case was tried before District Judge Albert V. Bryan, Jr., on behalf of respondent Sandberg individually. The jury was instructed that plaintiff was required to establish that

defendants' conduct proximately caused plaintiff's damages, JA 1117, that plaintiff was required to prove "one or more" of the alleged misrepresentations, JA 1114, and that "if you . . . find that the proxy solicitation itself was an essential link in the accomplishment of the merger transaction, then you are instructed it is no defense that the votes of the minority stockholders were not needed to approve the transaction." JA 1121. Petitioners made no objection to any of these instructions.

The jury returned separate verdicts for the plaintiff on both Counts I and II, determining that all of the petitioners had violated Section 14(a), and that the directors had breached fiduciary duties. Crediting the testimony of respondents' expert that the value of the stock was $60 rather than the $42 merger price, the jury fixed damages at $18 per share on alternative verdicts on Count I (for issuance of a misleading proxy statement found to be an essential link in the merger) and Count II (for breach of fiduciary duty). JA 1330. Thus, Sandberg's entitlement to recover $18 per share in damages will not be affected by any action this Court might take with respect to the federal claim, because she can enforce the alternative judgment against the directors for their breach of fiduciary duties.

Under principles of offensive collateral estoppel, the *Sandberg* judgment was applied in favor of the other respondents, who had filed a separate action after petitioners successfully opposed both class certification and attempts to intervene in the *Sandberg* action. The damages of respondents other than Sandberg totaled $3,292,236. As to Count II, however, the judgment was limited to $2,346,533.34, based on Virginia Code Ann. § 13.1-692.1, which limits the amount of damages that can be imposed on a director for state law violations "in any proceeding." The entitlement of respondents other than Sandberg to this amount will not be affected by any action of this Court with respect to Count I.

The Fourth Circuit's Decision. On appeal to the Fourth Circuit, respondents urged that the controlling issue in the case was whether the plaintiff in a Section 14(a) case must prove that he or she relied on the proxy statement.[2] Affirming the judgments against petitioners in all respects,[3] the Fourth Circuit rejected petitioners' principal argument on the ground that, under this Court's decision in *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970), reliance is not an element of a private cause of action under Section 14(a).[4] Pet. App. 11a. Instead, the court followed the holding of *Mills* that a plaintiff is required to establish only that there were material misrepresentations and or omissions and that the proxy solicitation itself was an essential link in the accomplishment of the transaction.[5] *Id.* at 13a-14a.

Because petitioners had conceded that the proxy statement was an essential link in the transaction, *id.* at 13a n.1, the Fourth Circuit next addressed the proof of material misrepresentations. *Id.* at 14a. The court affirmed

[2] Petitioners presented their case to the Court of Appeals this way:

> This case presents a simple question for the Court. The question is whether a plaintiff who did not grant a proxy, who admitted she did not rely upon anything in a proxy statement, and who voted against the transaction for reasons unrelated to the proxy statement, can maintain a direct action for damages under Section 14(a) (Fourth Circuit Brief of Appellants First American Bankshares, Inc. and Virginia Bankshares, Inc., at 12).

[3] The Court of Appeals also reversed the district court's denial of class certification, and remanded for entry of an order certifying a class. *See* Pet. App. 8a-11a.

[4] Although the Petition asserts that the court also found it irrelevant that "the minority shareholders had no means of blocking the merger," Petition at 8, examination of the court's opinion shows that this assertion is totally unfounded. Because petitioners never presented any argument to the Court of Appeals on this issue, the court had no occasion to address it.

[5] This much, the court observed, had been recognized by the petitioners in their own proposed jury instructions. Pet. App. 13a n.2.

the jury's finding that the proxy statement omitted and misstated material facts. The court held that the evidence supported a verdict that the representation that the directors approved the merger because it presented stockholders with an opportunity to achieve a high value for their shares misstated the facts. *Id.* at 15a. The directors made no such determination but approved the merger to retain their seats on the board. *Id.* This misrepresentation, the court held, could not be said to be immaterial as a matter of law. *Id.* at 16a. Similarly, the court held that whether "KBW's $42 valuation was something less than the product of a completely independent analysis was a question of fact" and that "[t]he representation in the proxy statement that it was such an independent determination could certainly have been found to be a material misrepresentation." *Id.*

The court found it unnecessary to reach petitioners' argument that four related allegations of material misrepresentations and or omissions that had been submitted to the jury were immaterial as a matter of law. It rejected, for two reasons, petitioners' contention that a new trial would be required if any one of the submitted misstatements and/or omissions was immaterial as a matter of law. First, "the submission of both correct and incorrect factual bases supporting a single theory of recovery is not grounds for reversal of a judgment on a general verdict." *Id.* at 17a. Second, the court held that petitioners' attack on the verdict was precluded by their failure to object to the trial court's instruction that the jury was required to find "one or more" material misstatements or omissions. *Id.* at 17a-18a.

REASONS FOR DENYING THE WRIT

It is clear from comparison of the facts stated above with the statement of facts in the Petition that the parties sharply disagree as to the facts. That disagreement, however, has been resolved in respondents' favor by the jury, and the Court of Appeals has determined that there was ample evidence to support the jury's verdict.

Accordingly, the Petition is essentially an effort to reargue factual issues that have been resolved against petitioners by the jury's verdict. For example, petitioners' Point I is the legal proposition that, where *all the material facts are adequately disclosed*, a plaintiff cannot prevail under Section 14(a) merely by alleging that directors failed to disclose a subjective motive to breach their fiduciary duty, or failed to characterize the disclosed facts in a self-accusatory manner. The Fourth Circuit did not hold otherwise. Petitioners' legal argument is purely hypothetical because it is premised on the tired version of the facts that was rejected by the jury when it found that the proxy statement *misstated and omitted material facts*. The Court of Appeals correctly held that respondents had not shown that there was no evidentiary basis for the verdict.[6] Accordingly, this Court should not grant certiorari on Point I because this Court does not sit to review facts determined by two courts below.[7]

The argument asserted in Point II of the Petition—that the Court of Appeals erred by regarding the proxy statement as an essential link in the accomplishment of the merger—also ignores what took place in the courts below. The Court of Appeals correctly recognized that petitioners conceded that the proxy statement was an essential link in the accomplishment of the transaction. Pet. App. 14a n.2. Petitioners are thus barred from seek-

[6] The jury's verdict could be reversed only upon a showing that there was no evidentiary basis to support it. *Lavender* v. *Kurn*, 327 U.S. 645, 653 (1946). *See also TSC Indus.* v. *Northway, Inc.*, 426 U.S. 438, 450 (1976) (determination of materiality peculiarly for the trier of fact).

[7] *Graver & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949) ("A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error"); *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant certiorari to review evidence and discuss specific facts"); R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* § 4.14 (6th ed. 1986) [hereinafter Stern & Gressman].

ing review of the causation question discussed in footnote 7 of *Mills* v. *Electric Auto-Lite Co.*, *supra*—an issue not even mentioned in petitioners' briefs in the Court of Appeals. Moreover, the evidence established that the proxy statement was an essential link in the accomplishment of the merger, and that the merger injured minority stockholders by converting stock worth $60 into a right to receive $42.

Similarly, the argument raised in Point III of the Petition was expressly found by the Court of Appeals to have been waived at trial and, in all events, challenges only a straightforward application of well-established procedural and evidentiary principles by both courts below.

Finally, this Court's consideration of the federal issues presented in the Petition would have little practical effect on the judgments below. Because the alternative state law judgment is not at issue here, the only consequence even of outright dismissal of the federal issue would be the triggering of a Virginia law limiting the damages recoverable from a director on the state law claim "in any proceeding." Under that limitation, the named respondents still would be entitled to recover some two-thirds of the amount of the federal judgment on the alternative state law judgment. Members of the class, moreover, would be entitled to their full recovery either because the Virginia limitation of liability cannot override litigants' rights under Fed. R. Civ. P. 23 (an issue not considered by the lower courts because no class has yet been certified) or because class members faced with such a limitation on recovery would choose to opt out and file separate proceedings in which they would be entitled to full recovery. Thus, this case would be an inappropriate vehicle for consideration of the issues petitioners seek to raise for the additional reason that any decision on the federal claims would have a limited practical effect on the litigants.[8]

[8] *See Rice* v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955) (this Court does not sit to decide academic questions); Stern

I. THE COURT OF APPEALS CORRECTLY HELD THAT THE EVIDENCE SHOWED MISSTATEMENTS OF FACT THAT WERE PROPERLY SUBMITTED TO THE JURY

The Petition asserts that the Fourth Circuit "held that petitioners were bound to characterize [disclosed] facts pejoratively, even to the point of accusing themselves of harboring wrongful subjective motivations in breach of their fiduciary duty." Petition at 11-12. The Court of Appeals did no such thing, and one searches its opinion in vain for any such holding. One finds instead the court's recital of the materiality standard adopted in this Court's decision in *TSC Industries* v. *Northway, Inc.*, 426 U.S. 438, 449 (1976), recognition that it is peculiarly the office of the finder of fact to make the "delicate assessment of the inferences a 'reasonable shareholder' would draw" from the facts, and a fact-specific application of those well-settled standards to this case. That exercise merits no review by this Court. As demonstrated below, moreover, the Fourth Circuit's decision is not in conflict with decisions from other circuits.

A. The Proxy Statement Falsely Represented That The Board Approved The Merger Because It Offered Minority Stockholders An Opportunity To Achieve A High Value For Their Shares When, As A Matter Of Fact, No Such Determination Had Been Made

A board's reason for proposing a merger is so material a fact to stockholders that Va. Code Ann. § 13.1-718 (B)(1) requires that the directors state their recommendation to the stockholders, and 12 C.F.R. § 335.212, Item 14(a), requires that the reasons for the merger be set forth in the proxy statement. The instant proxy statement represented that the Bank's directors had approved the merger because it offered the minority stockholders an opportunity to achieve a high value for their shares.

& Gressman, *supra* note 7, at 201-202 (Court will not review decision where petitioner would be liable under either state or federal law).

The evidence showed that, in fact, the directors never made any such determination, but approved the merger merely to avoid being replaced. JA 851-52, 863, 874-75; Pet. App. 15a.

The Petition recites—as if it were fact—the reason for the board's recommendation as stated in the proxy statement. Petition at 3-4. The evidence showed, however, that the representation that the directors approved the merger because it offered minority stockholders an opportunity to achieve a high value for their shares was a fiction drafted by the buyer's lawyers as part of the plan to prevent shareholder opposition to an unfairly low price by falsely stating that the board had determined that the price was a high one. The representation that such a determination had been made was clearly an untrue statement of fact at the time it was drafted, and it remained an untrue statement of fact because the determination was never made. That misrepresentation of fact was sent to the Bank's stockholders, in the name of the board, without review or approval by the board. The Court of Appeals—rather than holding that subjective motivations must be revealed—simply rejected petitioners' argument that the evidence did not support a verdict that this was a false statement of material fact.

In this respect, the instant case is exactly like another case in which another Court of Appeals flatly rejected the same argument by the same petitioner. *Berg* v. *First American Bankshares, Inc.*, 796 F.2d 489 (D.C. Cir. 1986). There, as here, FABI relied on *Dataprobe Acquisition Corp.* v. *Datatab, Inc.*, 722 F.2d 1 (2d Cir. 1983), *cert. denied*, 465 U.S. 1052 (1984), and similar cases for the proposition that the subjective motivations of the decision-maker are not material to an informed decision by stockholders. FABI there argued that it was not misleading for the proxy statement involved in *Berg* falsely to state that the decision-maker had considered certain factors. The court rejected that argument, holding that "[t]he drafters of the proxy statement could not legitimately attribute to [the decision-maker] factors he

did not actually consider, thereby making [the] decision appear informed, and then shield themselves by arguing that . . . subjective motivations are not material." 796 F.2d at 497.

The court distinguished *Dataprobe* on the ground that the proxy statement at issue there had fully described certain guarantees of employment negotiated by the company's directors and that, therefore, there was no additional need for the proxy affirmatively to announce that the directors and officers preferred one offer over another because of the employment guarantees. 796 F.2d at 496. By contrast, the *Berg* court observed that FABI's proxy statement, after recounting that the decision-maker approved the offer, went on to recount the factors on which that decision was based. Nothing in *Dataprobe* or any other case grants a license to state those factors falsely.

Similarly, in the instant case, petitioners had no license to make a false statement that the directors had made a determination that, in fact, they never made. As in the prior case involving FABI, petitioners here could not legitimately attribute fictional reasons to the Bank's board, thereby making the decision appear informed, and then shield themselves by arguing that the board's true reason for approving the merger was not material.

Petitioners' strained attempt to create a circuit conflict out of the unremarkable and fact-specific decision of the Court of Appeals is based entirely on the false premise that there was no misstatement or omission of material fact in the instant proxy statement. The jury's verdict to the contrary could be reversed only upon a showing that there was no evidentiary basis to support it. *Lavender* v. *Kurn*, 327 U.S. at 653. As shown above, however, there was evidence from which the jury could find not merely a subjective motive to violate fiduciary duty but a false representation of fact.

The Fourth Circuit's decision is not inconsistent with the cases relied on by petitioners, none of which involve, as this case does, a false statement. Petitioners'

cases are typified by *Golub* v. *PPD Corp.*, 576 F.2d 759, 764-65 (8th Cir. 1978). There, the court said that if a proxy statement "fully and fairly sets out such relevant and material facts as would enable a reasonably prudent stockholder to make an intelligent decision" as to how he would vote, a plaintiff may not state a claim under Section 14(a) merely by alleging a failure to disclose that the subjective motivation of the directors was to benefit themselves in breach of their fiduciary duty. Similarly, in *Biesenbach* v. *Guenther*, 588 F.2d 400 (3d Cir. 1978), also relied on by petitioners, the court merely held that "[t]he unclean heart of a director is not actionable, whether or not it is 'disclosed,' unless the impurities are translated into actionable deeds or omissions both objective and external." *Id.* at 402 (quoting *Stedman* v. *Storer*, 308 F. Supp. 881, 887 (S.D.N.Y. 1969)).

Those cases are not in conflict with the decision below because the jury here found deeds and omissions both objective and external—namely, petitioners' dissemination of a proxy statement, unseen by the board in whose name it was issued, that falsely stated that the board had made a determination that—as a matter of fact—it never made. Nor is there a conflict with *Kadamian* v. *Ladish*, 792 F.2d 614, 624 (7th Cir. 1986), where it was not alleged that the reasons given for the merger were false. Unlike all the cases relied on by petitioners, this case involves an affirmative false statement.

That fact also unmasks the error of petitioners' related contention that the decision below applies Section 14(a) of the Securities Exchange Act to no more than a breach of fiduciary duty in contravention of *Santa Fe Industries* v. *Green*, 430 U.S. 462 (1977). As the court pointed out in *Kas* v. *Financial General Bankshares, Inc.*, 796 F.2d 508, 512 (D.C. Cir. 1986), a case relied on by petitioners, *Santa Fe* held only that "a breach of fiduciary duty, absent any element of deception or manipulation, stated no claim under Section 10(b) [but did not] preclude an action under the Securities Exchange Act based on a material nondisclosure or mis-

representation simply because the undisclosed facts involved might also support a breach of fiduciary duty claim." As the Court of Appeals held, this case involved material misstatements.

The facts found by the jury reveal that there is no merit to petitioners' assertion that the decision below "expands the scope of federal proxy regulation to include the entire spectrum of state fiduciary law." Petition at 10. To the contrary, the federal proxy statute was applied here because petitioners issued a proxy statement containing false statements.

B. The Proxy Statement Falsely Represented That The Board Relied On An Independent Determination Of The Value Of The Stock When, As A Matter Of Fact, It Did Not

Once again, the evidence presented to the jury, but ignored by petitioners, shows the error of petitioners' contentions. That evidence showed that the proxy statement falsely represented that the board's recommendation was supported by an independent determination that the minority stock was worth $42 when, in fact, there was no such independent determination. The Bank's board specifically decided not to obtain an independent determination, JA 1018, and FABI destroyed any pretense of independence by KBW when it sought and obtained KBW's agreement to rubber-stamp its $42 price. The evidence permitting the jury to so find included a specific admission by FABI that telling KBW in advance the price it wanted to pay would compromise KBW's independence, JA 676-77, KBW's concession that it had in fact been told in advance the value FABI wanted it to reach, JA 839-40, the grudging concession by FABI's Beddow in front of the jury that he did indeed disclose the requested result in advance of the inquiry, JA 935-36, and proof that KBW made no inquiry into the inherent value of the shares and focused its discussion with the Bank's directors more on the question of how to avoid an adverse public reaction to the $42 price than on determination of the value of the stock. JA 1184.

Moreover, FABI's effort to palm off KBW's rubber-stamp of the price FABI wanted to pay as an independent determination that the price was fair to minority stockholders arose in the context of a transaction in which a fairness opinion was particularly important to minority stockholders as an independent certification that the controlling stockholder's offer was fair to them. *See Herskowitz* v. *Nutri System, Inc.*, 857 F.2d 179, 184 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 1315 (1989). The misleading nature of the representation that KBW acted independently was exacerbated by the fact that KBW, contrary to its normal practice, did not state in its opinion letter to whom the $42 price was fair. JA 569-70. Adherence to the usual practice would have required a representation that the price was fair only *to FABI*. *Id.*

The Court of Appeals correctly held that whether KBW acted independently was a question of fact, and that the evidence supported a verdict that it did not. Pet. App. 16a-17a. Petitioners' argument that the misstatement "could not 'have been viewed by the reasonable investor as having significantly altered the "total mix" of information,'" Petition at 19, ignores the evidence as to what the true facts were.[9]

In light of the evidence here of a deliberate effort to portray KBW's blind endorsement of FABI's price as an independent determination of fairness to minority stockholders, there is absolutely no basis for petitioners' argument that the Court of Appeals' fact-specific application of traditional Section 14(a) principles is a "profoundly disturbing" expansion of the law.[10]

---

[9] For example, the Petition glosses over the evidence supporting a verdict that KBW sold its independence with the circumlocution that "KBW had knowledge of FABI's views on the issue of financial fairness." Petition at 17.

[10] Petitioners do not accurately describe the holding of the district court in *Rodel* v. *Thomas*, 534 F. Supp. 1302, 1315 (S.D. Ohio 1982), *aff'd on other grounds*, 772 F.2d 244 (6th Cir. 1985), when they state that it rejected "a claim that the description of an investment banking firm as 'independent' could constitute a material mis-

II. PETITIONERS CONCEDED THE CAUSATION ISSUE LEFT OPEN IN *MILLS* v. *ELECTRIC AUTO-LITE CO.* AND, IN ANY EVENT, THE JURY'S VERDICT OF CAUSATION WAS SUPPORTED BY THE EVIDENCE

Petitioners argue that the Court of Appeals "eliminat[ed] . . . the requirment of causation from the implied cause of action under Section 14(a)" by regarding the instant proxy statement as an essential link in the transaction. Petition at 19-20. Quite to the contrary, it was petitioners themselves who conceded in the trial court that the proxy statement was an essential link in the transaction, and the Court of Appeals had no occasion to do more than take note of that fact because petitioners did not brief the question in the Court of Appeals. Pet. App. 13a n.1. Petitioners' concessions preclude them from seeking this Court's review of the causation question they belatedly seek to present. Moreover, the factual record in the case once again fails to present the issue petitioners frame because the jury found that the proxy statement *was* an essential link in the merger that injured minority shareholders by converting shares of stock worth $60 into a right to receive $42. In any event, there is no need for this Court to consider the *Mills* footnote 7 question.

A. Petitioners Waived The Question Left Open In *Mills* Both By Admitting That The Proxy Statement Was An Essential Link In The Transaction And By Failing To Object To The Jury Instruction On That Point

In *Mills* v. *Electric Auto-Lite Co.*, the Court held that in a private action under Section 14(a), it is not necessary either to show that the defect in the proxy statement "actually had a decisive effect on the voting," 396 U.S. at 385, or that there was any causal connection between "the particular defect in the solicitation materials" and the injury suffered by the plaintiff. *Id.* Instead, the

representation." The court held only that the particular proxy statement at issue there was not misleading.

Court held that causation is established in a private action under Section 14(a) by a showing that the misrepresentation was material and that the proxy statement was an essential link in the accomplishment of the transaction for which the proxy was sought. *Id.* at 384.

While not deciding the question, the Court "hinted rather broadly" [11] that a proxy solicitation is "sufficiently related to the merger" to constitute an essential link, even where management controls enough votes to approve the transaction, "if the management finds it necessary for legal or practical reasons to solicit proxies from minority shareholders." 396 U.S. at 385 n.7.[12]

Petitioners assert that the Court should grant certiorari to resolve the "open issue" of *Mills*' footnote 7, and to hold that the proxy statement below was not an essential link in the accomplishment of the transaction. Petitioners once again ignore the record in this case, which demonstrates that they conceded that the proxy statement was an essential link in the transaction, and failed to object to the jury instruction on the essential link point. For these reasons, the issue they seek to raise is not presented in this case.

Petitioners waived numerous opportunities to assert the issue of which they now seek this Court's consideration. Specifically:

- The complaint alleged that the proxy solicitation was an essential link in the accomplishment of the

[11] Note, *Loss and Transaction Causation: The Second Circuit Resolves the Causation Controversy in Majority Control Situations*, 22 Wash. & Lee L. Rev. 683, 687 n.34 (1975). *See* Folk, *Corporation Law Developments—1969*, 56 Va. L. Rev. 755, 829 (1970) (court "obliquely indicated" that causation test could be met in such circumstances).

[12] Such a result is consistent with the rationale of *Mills* that use of a materially misleading solicitation is itself a violation of a statute enacted to insure "that proxies would be solicited with 'explanation to the stockholder of the real nature of the questions for which authority to cast his vote is sought.'" *Id.* at 381.

transaction, JA 191, and petitioners so admitted by answer, JA 343, and at trial, JA 820.

• At trial, petitioners' counsel foreclosed this area of inquiry by objecting to a line of questioning on the point because "[t]hat's an uncontested matter." JA 820.

• Petitioners did not object to the trial court's instruction that "if you . . . find that the proxy solicitation itself was an essential link in the accomplishment of the merger transaction, then you are instructed *it is no defense that the votes of the minority stockholders were not needed to approve the transaction*." JA 1121 (emphasis supplied).

• The jury was also instructed, again without objection, that the plaintiff was required to establish that defendants' conduct proximately caused plaintiff's damage. JA 1117.

• Petitioners themselves asked for an instruction submitting to the jury the question whether the proxy statement was an essential link in the accomplishment of the transaction, JA 424-25, 466, thereby recognizing that FABI's voting power did not preclude a finding that the proxy statement was an essential link in the transaction.

• Petitioners' briefs in the Court of Appeals did not so much as cite what is now described as the "famous" footnote 7 of *Mills*.

Petitioners thus have clearly waived any contention as to the absence of causation, and are foreclosed from raising that point here. Federal Rule of Civil Procedure 51, and this Court's practice of requiring presentation of issues to the lower courts in the first instance,[13] prohibit

[13] *Cardes* v. *Arkoma Assocs.*, 110 S. Ct. 1015, 1022 (1990) (refusing to consider question not addressed in first instance by Court of Appeals); *City of Canton* v. *Harris*, 109 S. Ct. 1197, 1203 n.5 (1989) (Court refused to consider claim that was neither passed on by the Court of Appeals nor presented to that court as a distinct ground for its decision); *EEOC* v. *Federal Labor Relations Auth.*, 476 U.S. 19, 24 (1986) (cert. dismissed as improvidently granted) ("Our normal practice, from which we see no reason to depart on this occasion, is to refrain from addressing issues not raised in the Court of Appeals"); *FTC* v. *Grolier Inc.*, 462 U.S. 19, 23 n.6 (1983) (Court declined to address issue that respondent failed to raise before district court or Court of Appeals).

petitioners from letting the case go to the jury on the admissions and instruction quoted above, and then seeking to raise the point admitted and covered in the instruction on a petition for writ of certiorari.[14]

B. The Evidence Supported The Jury's Verdict That The Proxy Statement Was An Essential Link In The Transaction That Caused Respondents' Injury

Petitioners' argument that "the lower courts in this case have totally overlooked the need to establish how the challenged errors in the proxy statement caused the amount of damages claimed." Petition at 26, is directly contrary to this Court's holding in *Mills* that it is not necessary, in a Section 14(a) case, to show causal connection between "the particular defect in the solicitation materials" and the injury suffered by the plaintiff. 396 U.S. at 385. What is necessary under *Mills* is that the proxy statement was an essential link in the transaction and that the transaction injured the plaintiff. Both of these elements—sometimes referred to by the lower courts as "transaction causation" and "loss causation"—were established by the evidence here. Thus, the causation question recited in the Petition, premised on the purported facts that the proxy statement could not have affected the outcome of the voting *and* that "plaintiff has not demonstrated causation in any other way," Petition at (i), is simply not presented in this case.

[14] Petitioners briefly referred to footnote 7 of *Mills* in the district court when, while not objecting to the court's instruction that "it is no defense that the votes of the minority stockholders were not needed to approve the transaction," JA 1121, petitioners objected to plaintiff's proposed instruction on reliance which, as is clear from the content of the instruction at JA 1132, merely restated the rule of law that this Court *did* decide in *Mills*.

1. Respondents established the causal connection between the merger and their loss by proving that the stock the merger converted into $42 was worth $60. That is exactly what *Mills* requires. 396 U.S. at 388-89.

2. The evidence here also showed that, in fact, the proxy statement was an essential link in the accomplishment of the transaction, thus providing so-called transaction causation. Virginia law required dissemination of of a proxy statement containing the board's recommendation as an absolute prerequisite to accomplishment of the transaction. Va. Code Ann. § 13.1-718(B)(1). Moreover, the evidence showed that for practical reasons, FABI regarded issuance of this proxy statement as necessary to obtain the desired broad shareholder support for the transaction at $42 per share, and thereby to avoid a repeat of the Maryland experience in which stockholder opposition to the price led to the Board's failure to recommend the merger and ultimately forced FABI to increase its price. *See supra*, at 3. Indeed, minority stockholder support for the $42 price was so essential that FABI represented that the merger would not take place without it. JA 724.

C. There Is No Need For This Court To Revisit The Causation Question Left Open In *Mills*, Even If It Had Been Presented Below

Petitioners ask this Court to grant certiorari to establish as a matter of law that a proxy solicitation can never be an essential link in a transaction simply because a party has voting control, no matter how necessary the proxy statement might have been in fact. Under the rule sought by petitioners, those with voting control can issue a materially misleading proxy statement without fear of an action by the very individuals whose response to the proposed merger was manipulated by that misleading proxy statement, even if such manipulation is needed to accomplish the transaction. Petitioners can cite no case endorsing this palpably unjust and incorrect interpretation of the securities laws. Such a holding, the Second

Circuit noted in *Schlick* v. *Penn-Dixie Cement Corp.*, 507 F.2d 374, 383 (2d Cir. 1974), *cert. denied*, 421 U.S. 976 (1975), "would make the proxy requirements a farce," and ought not to be countenanced.[15]

The lower courts have had no trouble recognizing that there are a variety of factual circumstances in which a proxy statement might constitute an essential link, and have thus held, as in the case cited by this Court in *Mills*,[16] that whether the proxy solicitation is an essential link in the transaction is a question of fact.[17] For example, the Second Circuit in *Schlick*, 507 F.2d at 382, refused to allow dismissal of a Section 14(a) claim despite management control, because minority stockholders may "have recourse to measures other than the casting of proxies" to oppose those who have "the naked strength to consummate a fraudulent transaction" (quoting *Heyman* v. *Heyman*, 356 F.Supp. 958, 967-69 (S.D.N.Y. 1973)), and full disclosure could result in "modification or reconsideration of the terms of the merger by those in control. . . ." *Id.* at 384. As demonstrated, respondents proved just that here.

Petitioners incorrectly imply that *Schlick* and other lower court cases hold that a proxy statement can be shown to be an essential link in the transaction only when accurate disclosure would have provided the basis for a state court injunction against the transaction. Petition at 21. As shown above, however, *Schlick* itself held otherwise. Moreover, the courts have recognized a wide variety of factual settings that establish that a proxy solicitation

---

[15] *See also* 3B H. Bloomenthal, *Securities and Federal Corporate Law* § 11.20[1][b] at 11-108 (rev. ed. 1990) (describing as "sophistry" the argument asserted by petitioners on the footnote 7 question).

[16] *Laurenzano* v. *Einbender*, 264 F. Supp. 356, 361 (E.D.N.Y. 1966).

[17] As noted above, petitioners themselves so recognized by proposing instructions to submit the essential link question to the jury, as the District Court, in fact, did.

is an essential link in a transaction for purposes of so-called Section 14(a) "transaction causation." [18]

In sum, *no court* has held, as petitioners seek, that the essential link inquiry is foreclosed as a matter of law whenever management controls enough votes to approve the transaction. This Court's consideration of the question is not warranted.

D. The Rule 10b-5 Question Argued By Petitioners Is Not Presented By This Case

Petitioners' final argument asserts a need for resolution of an issue that has arisen in certain cases under Rule 10b-5, 17 C.F.R. § 240.10b-5, but which was not raised below and is simply not presented by this case. The cases on which petitioners rely are fundamentally different from this case and the situation described in footnote 7 of *Mills* because, in petitioners' cases, no legal or practical reason required issuance of a proxy statement. Thus, there was no basis for invoking Section 14(a) or its policy of "ensuring that the shareholders are able to make an informed choice when they are consulted in corporate transactions." *Mills*, 375 U.S. at 305.

The plaintiffs in the cases cited by petitioners instead sought relief under Rule 10b-5's proscription against fraud in connection with the purchase or sale of a secu-

[18] *See, e.g., Lockspeiser* v. *Western Md. Co.*, 768 F.2d 558, 562 (4th Cir. 1985) (shareholders may decide to seek remedies such as appraisal rights); *Selk* v. *St. Paul Ammonia Prods., Inc.*, 597 F.2d 635, 638 (8th Cir. 1979); *Cole* v. *Schenley Indus.*, 563 F.2d 35, 39-40 (2d Cir. 1977); *Efros* v. *Nationwide Corp.*, [1982-1983 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 99,077, at 95,119 (S.D. Ohio 1983) (merger conditioned on receiving vote of majority of minority stockholders); *Smillie* v. *Park Chem. Co.*, [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,891, at 95,660 (E.D. Mich. 1979); *Ecmar Oil Corp.* v. *Getty Oil Co.*, [1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,358, at 93,230 (C.D. Cal. 1978) ("[w]hether the proxy statement was an essential link in the accomplishment of [a] transaction must be determined by the trier of fact"); *Clayton* v. *Skelly Oil Co.*, [1977-1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,269, at 92,748 n.5 (S.D.N.Y. 1977) (recognizing that adverse publicity might cause change in terms of transaction).

rity. Certain of these Rule 10b-5 cases have required that plaintiff show that truthful disclosure would have provided a means of self-protection. *Madison Consultants* v. *FDIC*, 710 F.2d 57, 64 (2d Cir. 1983). Petitioners cite a treatise for the proposition that this Court should decide a question that has arisen when the plaintiff in such a Rule 10b-5 case cites the possibility of a state court injunction against the transaction as his available means of self-protection. Petition at 27. The particular issue to which petitioners refer is the question of what kind of factual showing must be made in such a case that the state court injunction would have been obtained.

That issue, which was not raised below, is not presented by this case for three reasons.

1. This is a Section 14(a) case governed by the language and purpose of a statute entirely different from Rule 10b-5. This Court has long recognized that causation under Section 14(a) is fundamentally different from that under Rule 10b-5.[19]

2. Although not required to do so, respondents in fact proved an available means of self-protection in the form of evidence that truthful disclosure would have stopped this merger just as it stopped a similar transaction by FABI with respect to a sister subsidiary. Petitioners seek to obscure the significance of this showing with the erroneous implication that the only means of self-protection recognized by the Rule 10b-5 cases is a state court injunction. *See* Petition at 25. To the contrary, the Rule 10b-5 cases relied on by petitioners recognize that stockholders have a variety of "available methods of self-protection." *Madison Consultants*, 710 F.2d at 64. The means of self-protection referred to in these cases

[19] *See, e.g., Mills* v. *Electric Auto-Lite Co., supra*; *Basic, Inc.* v. *Levinson*, 485 U.S. 224, 243 (1988). The fact that petitioners rely on Rule 10b-5 cases in this Section 14(a) case is swept under the rug in a footnote asserting that "the *Santa Fe* causation analysis extends to Section 14(a) as well." Petition at 26 n.8. The commentaries cited, however, support no such broad assertion, and this Court's decisions most certainly do not.

include request for assistance from the SEC, *id.*, and blocking the transaction by public disclosure of the scheme, *United States* v. *Margala*, 662 F.2d 622, 626-27 (9th Cir. 1981) (cited favorably in *Madison Consultants*).[20]

3. The issue on which petitioners belatedly seek review was never raised below. To the contrary, petitioners tried this case on the question whether the proxy statement was an essential link in the transaction, even to the point of both acquiescing in respondents' jury instruction on the subject and proposing their own instruction submitting the essential link question to the jury.

Whatever the merit or lack of merit of the suggestion that this Court should address the Rule 10b-5 question raised in the treatise cited by petitioners, that question is simply not presented by this case.

III. THE COURT OF APPEALS CORRECTLY HELD THAT PETITIONERS WAIVED ANY CLAIM OF ERROR IN THE SUBMISSION OF SEVERAL RELATED MISREPRESENTATIONS TO THE JURY UNDER A SINGLE COUNT AND, IN ANY EVENT, ITS ALTERNATIVE HOLDING THAT THERE WAS NO ERROR IS CORRECT

Petitioners' third line of attack on the Fourth Circuit's decision is again premised on facts not found in this record. Petitioners ask the Court to decide whether a general verdict may be upheld "when some of the grounds of liability submitted to the jury were invalid." Petition at (i). No court, however, has made any determination that any of the grounds of liability submitted to the jury was invalid. The Fourth Circuit simply found it unnecessary to examine in detail the other misstatements after concluding that the first two false statements were material. Analysis of the others was unnecessary because, as the Fourth Circuit held, the evidence already considered was sufficient to support the single theory of materiality submitted to the jury.

[20] There is thus no legal significance—and the petitioners urged none in either of the courts below—to the fact that a minority stockholder, armed only with petitioners' misleading proxy statement, was unable to obtain a state court injunction. The evidence entitled the jury to find that truthful disclosure would have stopped the transaction without the need to resort to court.

Petitioners claim that a new trial would be required in some other circuits if there were "insufficient evidentiary support" for a verdict of materiality as to any one of the misstatements. The Court should not grant certiorari to review this argument for two reasons. First, as the Court of Appeals held, the argument has been waived. Second, the decision below is correct and does not conflict with this Court's decisions.

A. The Determination By The Court Of Appeals That Petitioners Waived The Claimed Error Does Not Present An Issue Worthy Of This Court's Consideration

The Court of Appeals held that petitioners were barred from raising the asserted error by failing to object to the instruction that plaintiffs were required to prove "*one or more*" of the alleged misrepresentations. Pet. App. 17a-18a.[21] Citing Fed. R. Civ. P. 51, the court said that "[t]he failure to object provides an independent ground to reject defendants' argument." Pet. App. 18a.[22] Thus, to reach the issue petitioners assert, the Court would first have to address the question whether the Fourth Circuit correctly determined that petitioners waived their argument by failing to contest the submission of the case to the jury under this instruction. The waiver question is plainly not an issue worthy of this Court's consideration. Nor have petitioners suggested any reason why this Court should grant discretionary review with respect to a jury

[21] Petitioners themselves proposed an instruction that it was sufficient that plaintiff prove "*an* untrue statement." JA 412, 451 (emphasis supplied).

[22] Thus, contrary to petitioners' attempt to characterize as a "suggestion" the holding that the point was waived, Petition at 29 n.12, it was, in fact, an independent basis for the decision below.

instruction as to which no objection was made.[23] Indeed, the case petitioners cite as one that "directly governs this case," Petition at 28, makes clear that this type of objection must be made before the case is submitted to the jury. *Wilmington Star Mining Co.* v. *Fulton*, 205 U.S. 60, 79 (1907).[24]

B. In Any Event, The Fourth Circuit's Disposition Of This Issue Follows This Court's Decisions

The Fourth Circuit's alternative ruling that the submission of both correct and incorrect factual bases supporting a single theory of recovery would not be grounds for the reversal of a general verdict, Pet. App. 17a, is correct and does not conflict with cases cited by petitioners. Indeed, what the court below said about those cases is equally applicable here: those cases "involve the submission of both incorrect and correct *legal* theories of recovery" under a general verdict. *Id.* (emphasis supplied).

Petitioners misstate *Wilmington Star Mining Co.* when they characterize that case as involving "eight factual claims." Petition at 27. Rather, the case involved multiple *legal* theories of recovery or "counts."[25] When

[23] *See Springfield* v. *Kibbe*, 480 U.S. 257 (1987) (dismissing writ of certiorari as improvidently granted where petitioner did not object to relevant jury instruction and "indeed proposed its own instruction to the same effect").

[24] Having conceded the propriety of the jury instruction requiring a finding only of "one or more" misrepresentations, petitioners nonetheless chastise the trial court for sustaining the verdict against post-trial motions. Petition at 29 n.12. Petitioners cite no authority for their unexplained assertion that the trial court somehow bears responsibility for petitioners' decision to let the case go to the jury under the "one or more" instruction rather than objecting to the instruction or requesting a special verdict. The argument cited from the J.N.O.V. hearing simply came too late under well settled standards that place on the parties the burden to bring objections to the attention of the trial court *before* the jury retires. Fed. R. Civ. P. 51.

[25] *See* Petition at 28 (quoting *Wilmington Star Mining Co.*, 205 U.S. at 79). "A 'count' is a distinct statement of a separate cause

the Court held that a new trial was required on the grounds that one of the counts in the complaint (then called a declaration) was not supported by the evidence, it was doing no more than following the usual rule that a general verdict will be reversed when one of several legal theories on which the verdict might have been based was erroneously submitted to the jury.[26] The Fourth Circuit's decision is entirely consistent with that rule.[27]

The Fourth Circuit's holding that it was unnecessary that each and every fact supporting a single theory be sufficient *by itself* to establish the theory of recovery is particularly appropriate to issues of materiality because materiality depends on the "total mix" of information available to stockholders, *TSC Industries* v. *Northway*,

of action," *General Motors Overseas Operations Div. of Gen. Motors Corp.* v. *The Lichtenstein*, 126 F. Supp. 395, 397 (S.D.N.Y. 1954), and the pleading rules in effect when *Wilmington Star Mining Co.* was decided required each cause of action to be set out in a separate count. *See* 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1324 at 466 n.34 (1969) (at common law and under codes, different causes of action had to be separately stated). *Cf.* Fed. R. Civ. P. 8(e)(2) & 10(b).

[26] That same general rule was applied in *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Prods. Co.*, 370 U.S. 19, 29-30 (1962) (in general verdict case, invalidation of conspiracy "theory of liability" necessitated new trial on alternative antitrust theories); and in *United Pilots Ass'n* v. *Halecki*, 358 U.S. 613, 618-19 (1959) (where case submitted to jury on two theories of liability, negligence and unseaworthiness, plaintiff's general verdict set aside and new trial ordered after unseaworthiness theory held invalid).

[27] *See Gill* v. *Rollins Protective Servs. Co.*, 722 F.2d 55, 59 (4th Cir. 1983). *See also McMurray* v. *Deere & Co.*, 585 F.2d 1436, 1444 (10th Cir. 1988) (reversal of general verdict required where jury was erroneously instructed on two legal theories of defense: assumption of risk and abnormal use); *Dudley* v. *Dittmer*, 795 F.2d 669, 673-74 (8th Cir. 1986) (invalidation of some antitrust theories necessitated new trial on others where there was a general verdict and where "each claim . . . involved distinctive legal and factual components"); *Brochu* v. *Ortho Pharmaceutical Corp.*, 642 F.2d 652, 662 (1st Cir. 1981) (fraud and strict liability theories); *Ventach* v. *Texaco, Inc.*, 630 F.2d 46, 59 (2d Cir. 1980) (breach of contract, illegal tying, and price fixing theories).

Inc., 426 U.S. at 449, and thus statements not materially misleading in themselves may become so as part of an overall context that creates a misleading effect.[28] Accordingly, the four other misstatements and omissions at issue here, which were directly related to the two principal misstatements discussed by the Court of Appeals, were required to be read in light of the others.[29]

The "delicate assessments" of the effect of these interrelated misstatements and omissions on the total mix of information "are peculiarly ones for the trier of fact," *TSC Industries* at 450, and the jury's verdict based on the total mix should not be reversed simply because one piece of evidence might not be sufficient, standing alone, to support a verdict. The Fourth Circuit's unremarkable application of these traditional principles does not require review by this Court.

CONCLUSION

For each of the foregoing reasons, the Petition should be denied.

Respectfully submitted,

JOSEPH M. HASSETT *
JOHN C. KEENEY, JR.
GEORGE H. MERNICK, III
DAVID G. LEITCH
ALBERT W. TURNBULL
HOGAN & HARTSON
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5643

* Counsel of Record

Counsel for Respondents

---

[28] *SEC* v. *C.E. Richmond & Co.*, 563 F.2d 1101 (9th Cir. 1977); *Gould* v. *American Hawaiian Steamship Co.*, 319 F. Supp. 795, 809 (D. Del. 1970) ("It is proper to find a proxy statement to have violated [Section 14(a)] if one misstatement or omission influences another, and to find the aggregate 'material'").

[29] *See* Pet. App. 16a-17a n.3 (identifying each of the four additional misrepresentations/omissions).

Supreme Court, U.S.
FILED
APR 10 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1448

In the Supreme Court of the United States

OCTOBER TERM, 1989

VIRGINIA BANKSHARES, INC., ET AL., PETITIONERS,

v.

DORIS I. SANDBERG, RESPONDENT.

FIRST AMERICAN BANKSHARES, INC., ET AL., PETITIONERS,

v.

PAUL H. WEINSTEIN, ET AL., RESPONDENTS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

REPLY BRIEF FOR PETITIONERS

JOHN S. STUMP
McGuire, Woods, Battle & Boothe
8280 Greensboro Drive
Post Office Box 9346
McLean, Virginia 22102

LEWIS T. BOOKER
Hunton & Williams
707 East Main Street
Post Office Box 1535
Richmond, Virginia 23212

STEPHEN M. SHAPIRO
Counsel of Record
ANDREW L. FREY
KENNETH S. GELLER
LAWRENCE C. MARSHALL
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 463-2000
Counsel for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
I. THE PROXY STATEMENT	1
II. CAUSATION	5
III. THE GENERAL VERDICT	8
CONCLUSION	10

TABLE OF AUTHORITIES

Cases:

Avins v. *White*, 627 F.2d 637 (3d Cir. 1980)	9
Basic Inc. v. *Levinson*, 485 U.S. 224 (1988)	8
Kademian v. *Ladish Co.*, 792 F.2d 614 (7th Cir. 1986)	3
Kern v. *Levolor Lorentzen, Inc.*, No. 87-6689 (9th Cir. March 9, 1990)	9
Mills v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970)	6-7
Mills v. *Maryland*, 486 U.S. 367 (1988)	6
Murphy v. *United States*, 653 F.2d 637 (D.C. Cir. 1981)	9
Olney Savings & Loan Assoc. v. *Trinity Banc Savings Assoc.*, 885 F.2d 266 (5th Cir. 1989)	9
On Lee v. *United States*, 343 U.S. 747 (1952)	6
Orr v. *Orr*, 440 U.S. 268 (1979)	6
Raley v. *Ohio*, 360 U.S. 423 (1959)	6
Santa Fe Industries, Inc. v. *Green*, 430 U.S. 462 (1977)	8
Schlick v. *Penn-Dixie Cement Corp.*, 507 F.2d 374 (2d Cir. 1974), cert. denied, 421 U.S. 976 (1975)	6

Miscellaneous:

A. Goolsby, *Virginia Corporation Law & Practice* (1989) (Prentice-Hall)	5

REPLY BRIEF FOR PETITIONERS

As every Supreme Court practitioner knows, the first resort of a brief in opposition to certiorari is to argue that the ruling below is "fact-bound" and for that reason affords no opportunity to resolve an important legal issue; and the second line of defense is to assert that the issues raised have been waived. Respondents prove that they are adept in deploying these tactics, serving up a farrago of "facts" (many of them inaccurate or misleading) that are said to support the jury's verdict and adding a liberal dose of (unsubstantiated) waiver claims. But the Court should not be deceived by these tactics: no matter how skillful respondents' advocacy, their effort founders on the decision actually rendered by the court of appeals. As a reading of that decision plainly shows, the misrepresentation and causation rulings relied on by the Fourth Circuit to uphold liability rest squarely on the legal principles presented for review by the petition, the general importance of which respondents barely bother to dispute.

I. THE PROXY STATEMENT

Respondents have tried valiantly to minimize the importance of the Fourth Circuit's ruling on what constitutes an actionable misrepresentation under the federal proxy laws. In the end, however, that cannot be done. To be sure, the jury's verdict rested on facts—as do all jury verdicts and all cases. But petitioners are not challenging any factual determination. Instead, petitioners are challenging, as a matter of law, the Fourth Circuit's holding that proxy solicitations can be deemed fraudulent based on a jury's findings regarding the subjective motivation of members of a board of directors, or based on disagreements about the use of adjectives to describe disclosed facts. The Fourth Circuit's ruling on these legal issues squarely conflicts with holdings of other circuits.

The directors' subjective motivations. The proxy statement sets forth the opinion of the board of directors that

the merger price was fair and also sets forth objective economic facts relevant to a shareholder's decision about whether the price was fair. The court of appeals found this statement to be a misrepresentation not because it was inconsistent with any objective fact but rather because the "jury was certainly justified in believing that *the directors did not believe a merger at $42 per share was in the minority stockholders' interest* but, rather, they voted as they did for other reasons, *e.g.*, retaining their seats on the board." Pet. App. 15a (emphasis added). Indeed, the court below explained that "the entire thrust of Sandberg's case" was that "the Bank's directors were considerably less concerned with the stockholders' interest than with their own." *Ibid.* In light of this unambiguous holding—focusing exclusively on whether the directors concealed their "real" (*ibid.*) subjective motivations—it is astonishing that respondents would argue that the subjective motivation issue is not presented here.

Respondents' reluctance to admit what the Fourth Circuit actually held is understandable, because the decision is so plainly inconsistent with the many cases cited in the petition (at 12-16) and because the practical consequences of the holding are so seriously adverse for *all* corporations that issue proxy statements.[1] Consequently, respondents have conjured up a new version of what the Fourth Circuit held. They now claim that the defect in the proxy statement was not that it falsely reported the directors' reasons for recommending the merger, but that it misrepresented whether the Board ever made a determination about fair price at all. Opp. 15. Hence, they suggest, the court of appeals premised its decision on the objective issue of what the Board actually did, and not the subjective issue of what the directors personally "believed." One need only read the actual opinion to realize how spurious this claim is. The opinion directly refutes respondents' claim that this case is distinguishable from the many cases holding that the federal securities laws are "not concerned that [defendants] had made a statement that, if the plaintiffs were correct, was misleading since it was not the *true* reason" management took the action in question. *Kademian* v. *Ladish Co.*, 792 F.2d 614, 624 (7th Cir. 1986).

[1] Under the Fourth Circuit's holding, *any* statement of reasons contained in a proxy statement is subject to attack on the theory that the corporate board (or some individuals on the board) harbored unexpressed subjective motivations.

There is little doubt why the Fourth Circuit did *not* accept respondents' newly-asserted theory: it has no support in the record. Both the executive committee and the board of directors of the bank adopted resolutions finding the merger "to be in the best interests of [the] Bank's shareholders." J.A. 1178, 1188. There is no question, moreover, that the executive committee insisted on hearing KBW's financial analysis of the fairness of the price. J.A. 788, 989, 1016. Respondents, of course, have continuously claimed that the directors were not *really* concerned about these matters, and that they were *really* acting for different reasons. Pet. App. 15a-16a. But that claim involves the precise sort of inquiry into the directors' subjective motivation that respondents would have this Court believe is not at issue in this case.

The "independence" of KBW. The Fourth Circuit also held that the proxy statement was false because it described KBW as an "independent" investment banking firm. Pet. App. 16a. As we explained in the petition, this decision perverts the federal securities laws because it bases liability under Section 14(a) on characterizations of fully disclosed facts. Thus, respondents repeatedly point out that KBW was hired by FABI, that it would receive extra compensation upon the merger's consummation, and that it was aware of the price range FABI was considering, but *all of these facts were revealed in the proxy statement*, and the Fourth Circuit never identified any item that should have been, but was

not, disclosed.[2] Beyond this, none of these facts draws into question the truthfulness of the description of this concededly unaffiliated investment banking firm as "independent."

Perhaps not surprisingly, respondents make *no* effort to defend this indefensible ruling. Instead, respondents invent and defend a holding that the court of appeals never made—that the proxy statement was materially false because it misrepresented that "KBW acted independently" or made an "independent determination" (Opp. 16, 17) that the price FABI wanted to pay was fair to minority shareholders. But the proxy statement did *not* say,

[2] Respondents' factual recitation also ignores the ground for liability in this case: this case concerns the adequacy of a proxy statement—not the fairness of the merger or the faithfulness of performance of fiduciary duty. In light of the fact that the court of appeals' opinion poses relatively pure legal issues, it is unnecessary for us to canvass the many distortions of the facts that respondents have introduced in their brief in opposition. But two particularly egregious examples merit response.

First, respondents assert that a memorandum by FABI's treasurer showed that the acquisition would be profitable even "if FABI paid $61 a share." Opp. 2. The document in question actually shows that if FABI paid $61 a share it would be investing $45 million in order to obtain an increased net income of just $299,000 a year (a return of less than 1%). J.A. 1169. As the expert from KBW testified, "[i]f I were to ask any client of ours to invest $45 million for only a $300,000 return, I would be invited out the door." J.A. 984.

Second, respondents claim that the "[d]irectors admitted at trial that the reason the board approved the merger was that the directors thought they had no choice and would be removed from the Bank's Board by FABI if they did not." Opp. 5. But the very pages of the Joint Appendix that respondents cite for this proposition contain the directors' testimony that they were deeply concerned about the fairness of the transaction. See J.A. 863 ("after deliberating on it, I felt it was probably in the best interests of all parties involved. The minority stockholders as well as the majority stockholders . . ."); *id.* at 852 ("Number one was the Keefe, Bruyette report. Number two, when they came to the meeting, I asked them questions. . . . I was satisfied with the answers they gave, and as I stated earlier, I was influenced by the fact that people did not buy the stock at $30 a share earlier.").

as respondents repeatedly assert, that KBW "made an independent determination" of fairness to minority shareholders. To the contrary, *the proxy statement made crystal clear that KBW rendered its evaluation on the basis of information provided by FABI and that KBW "did not attempt to verify independently any such information."* Pet. App. 54a.

Respondents' inability to justify the Fourth Circuit's decision, and their need to dream up an alternative rationale with no support in the record, is the best possible evidence that review by this Court is appropriate and necessary. The court of appeals' condemnation of this proxy statement is in direct conflict with a long line of cases holding that Section 14(a) deals with facts—not characterizations. See Pet. 17-19. Corporate directors should not be subjected to substantial risk of multi-million dollar liabilities based on a jury's disagreement with the directors' choice of words.[3]

II. CAUSATION

The Fourth Circuit could not have been clearer in its holding that a private cause of action can be maintained under Section 14(a) even though the votes of the minority shareholders are unnecessary to the proposed trans-

[3] There is no substance to respondents' claim that this Court's consideration of these federal issues would have little practical effect on the judgments below. As petitioners have explained, their liability on the federal count now amounts to $3.3 million, whereas their liability on the state law count is limited to $2.3 million. See Pet. 7, 9 n.5. Moreover, the liability on the federal count might be transformed on remand into a federal judgment in excess of $13 million. By contrast, the $2.3 million cap on state law liability will remain in effect no matter how large the class, and no matter how many members might opt out and commence independent proceedings under state law. See A. Goolsby, *Virginia Corporation Law & Practice* 125 n.7 (1989) ("The statute addresses the damages arising out of a single transaction or course of conduct."). Finally, the corporate defendants were not found liable on the state law count at all. In short, the petition for certiorari is hardly an academic exercise.

action. The court of appeals first recognized that footnote 7 of *Mills* v. *Electric Auto-Lite Co.* "left open the question of 'whether causation could be shown where management controls a sufficient number of shares to approve the transaction without any votes from the minority.'" Pet. App. 13a. The court then proceeded to "adopt the reasoning" of *Schlick* v. *Penn-Dixie Cement Corp.*, 507 F.2d 374 (2d Cir. 1974), and to hold that liability may be established "even when the minority's voting strength is insufficient to halt a merger." Pet. App. 14a. Given the Fourth Circuit's explicit holding on the *Mills* issue, respondents' claim that the issue was not adequately preserved in the lower courts is simply preposterous. This Court consistently has held that "[t]here can be no question as to the proper presentation" of a claim when the lower court has actually passed on it. *Raley* v. *Ohio*, 360 U.S. 423, 436-437 (1959). This principle has been recognized in cases on review from federal courts and even in cases arising from state courts, where the preservation question takes on jurisdictional significance. See *Mills* v. *Maryland*, 486 U.S. 367, 371 n.3 (1988) (state court); *Orr* v. *Orr*, 440 U.S. 268, 274-275 (1979) (state court); *On Lee* v. *United States*, 343 U.S. 747, 749-750 n.3 (1952) (federal court).

Moreover, there is no basis for respondents' argument that the causation claim was waived. In the district court, petitioners repeatedly objected to the court's ruling that a Section 14(a) case could go forward even though the minority shareholders lacked the votes needed to defeat the merger. For example, petitioners objected to instructions that allowed the jury to find that the proxy statement was an "essential link" simply because it was required by Virginia law. J.A. 1120. Counsel objected on the ground that "the court has wrongly, we believe, decided the issue of law left open by footnote 7 of the *Mills* decision." J.A. 1133. See also Bankshares' Summ. Judg. Br. at 50 (arguing that the *Schlick* "rule makes no sense, and it particularly makes no sense in this

case"); Bankshares' J.N.O.V. Br. at 4 (arguing that given the 85% share held by the majority shareholder, the proxy solicitation "was not an 'essential link' in the *accomplishment* of the merger transaction.") Far from having waived this argument, petitioners raised it at each relevant stage of the district court proceeding. Similarly, in their briefs before the court of appeals, petitioners strenuously challenged respondents' ability to demonstrate causation. See Br. of Corp. Defs. at 23-24. Of course, the best evidence that this issue was preserved and is properly before the Court is the Fourth Circuit's explicit holding on the issue.[4]

Aside from asserting that the causation argument has been waived, respondents try to portray it as another fact-bound application of settled legal principles. But this issue of statutory construction does not turn on the particular facts of this case. The question presented is whether the lower courts should be permitted to greatly expand the implied cause of action under Section 14(a) to allow recovery by plaintiffs whose *votes* concededly could not have affected the outcome of the ballot, and, if

---

[4] Respondents' claim (Opp. 18) that petitioners conceded that the proxy statement was an essential link is inaccurate. Petitioners acknowledged that the proxy statement was necessary under Virginia law (see J.A. 343, 820), but they never conceded—indeed (as explained in text) they repeatedly challenged—respondents' contention that the proxy statement could satisfy the "essential link" requirement of *Mills*. The fact that petitioners asked for an instruction informing the jury that it could find in favor of respondents only if the proxy was an "essential link" does not support respondents' waiver claim. Opp. 20. The issue went to the jury only because the trial court refused to settle it as a matter of law, as petitioners repeatedly requested.

Respondents also trumpet the irrelevant assertion that they "established the causal connection between the *merger* and their loss" (Opp. 22; emphasis added). What is required, however, is proof of a causal connection between the *Section 14(a) violation* and the plaintiffs' injury.

so, how these more tenuous causation theories can be established. See Pet. 19-27.[5]

This question of non-voting causation is precisely the issue that the Court left open in *Mills*; it is directly related to the non-voting causation issue that the Court addressed in *Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 462, 474 n.14 (1977); and it has caused substantial confusion in the lower courts ever since. See Pet. 24-27. There is nothing fact-specific about these issues, and there is a pressing need for this Court's review.[6]

III. THE GENERAL VERDICT

Respondents make no serious attempt to defend the Fourth Circuit's suggestion that petitioners somehow waived their claim that the jury's verdict can be upheld only if the reviewing court is confident that it rests on a sustainable theory. See Pet. 29 n.12. Instead of defending the Fourth Circuit's inexplicable discussion of waiver, respondents claim that it is not appropriate to grant certiorari to decide whether the Fourth Circuit erred in

[5] Respondents hint mysteriously that there are a variety of ways in which a plaintiff can prove causation in a non-voting case. See Opp. 23-24. But even if some non-voting theory of causation—such as ability to obtain a state-court injunction against the proposed transaction—were supportable, the more attenuated theories that respondents suggest, such as use of adverse publicity to discourage a proposed merger, are far too speculative and conjectural to support liability. In any event, respondents did not demonstrate causation under *any* theory in the courts below, choosing instead to rely on the bare fact that the proxy statement was required by Virginia law. Opp. 22.

[6] Petitioners agree that there might be a difference between non-voting causation in a Section 14(a) and a Section 10(b) case. Indeed, petitioners argue that precisely because of Section 14(a)'s unique focus on voting, there should be no private cause of action for non-voting injuries. But if the Court were to reject that argument, then the causation element of Section 14(a) and Section 10(b) would raise identical issues. This Court's causation rulings under Sections 10(b) and 14(a) repeatedly rely on the same authorities and principles. See, *e.g.*, *Basic Inc.* v. *Levinson*, 485 U.S. 224, 231-232 (1988); see also Pet. 26 nn.8-9.

deeming this claim waived. But no one has ever suggested that "waiver" is independently worthy of review. And no one should be heard to suggest that this clearly indefensible reference to waiver is sufficient to bar the Court from reviewing an important and recurring issue that is otherwise "certworthy."

A recent decision of the Ninth Circuit reveals just how divided the lower courts are on the question of reviewing general verdicts. In *Kern* v. *Levolor Lorentzen, Inc.*, No. 87-6689 (9th Cir. March 9, 1990), the court upheld a general jury verdict that might have rested on a claim that was not factually supported. In order to do so, however, the court carefully examined a variety of factors in order to assure itself that the jury in fact rested its decision on a sustainable allegation. Slip op. at 2539-2540. Judge Kozinski dissented, arguing that the approach that the panel took ran counter to at least four Supreme Court decisions, and that the court could not sustain the jury verdict unless it was adequately supported by *all* of the bases for liability placed before the jury. Notwithstanding these Supreme Court decisions, Judge Kozinski was able to discern at least four different approaches that the courts of appeals have taken in reviewing general verdicts. *Id.* at 2567-2571. As Judge Kozinski pertinently observed: "When the Supreme Court speaks consistently and repeatedly on an issue, the inferior federal courts are bound to follow suit." *Id* at 2567.

Respondents have referred to a number of circuits that may have adopted the unworkable fact/law dichotomy that the Fourth Circuit invoked here. But they have ignored the many other circuits that have rejected this dichotomy, and have refused to acknowledge that the Fourth Circuit's approach is in direct conflict with these rulings.[7] Nor do they address petitioners' contention that

[7] See, *e.g.*, *Olney Savings & Loan Assoc.* v. *Trinity Banc Savings Assoc.*, 885 F.2d 266, 270-271 (5th Cir. 1989) (11 factual allegations of fraud); *Murphy* v. *United States*, 653 F.2d 637, 646 (D.C. Cir. 1981) (three factual allegations of negligence); *Avins* v. *White*, 627

the allegations in this case would fall on the law side of any reasonable fact/law dichotomy. The widespread confusion about the proper mode of review of general verdicts is of more than academic interest, as it goes to the fundamental question of meaningful appellate review. This Court should use the present case to restore coherence to this important area of federal law. Granting the petition for certiorari would present the Court with an opportunity to do so in a case that raises additional issues independently worthy of review.

CONCLUSION

The petition for a writ of certiorari should be granted.[8]

Respectfully submitted.

JOHN S. STUMP
McGuire, Woods, Battle & Boothe
8280 Greensboro Drive
Post Office Box 9346
McLean, Virginia 22102

LEWIS T. BOOKER
Hunton & Williams
707 East Main Street
Post Office Box 1535
Richmond, Virginia 23212

STEPHEN M. SHAPIRO
Counsel of Record
ANDREW L. FREY
KENNETH S. GELLER
LAWRENCE C. MARSHALL
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 463-2000
Counsel for Petitioners

F.2d 637, 646 (3d Cir. 1980) (three factual allegations of defamatory statements).

[8] The bank in this case filed its proxy statement pursuant to regulations of the FDIC, and the merger at issue was approved by the FDIC. Pet. App. 52a. As the amicus brief filed by the American Bankers Association explains, the extravagant claims of liability sustained in this case are contrary to traditional regulatory policies advocated by the FDIC in past securities cases affecting federally regulated and insured banks. See U.S. Am. Br., *Marine Bank* v. *Weaver*, No. 80-1562, at pp. 24-26. Accordingly, if the Court is in doubt about whether to grant the petition, it may wish to obtain the views of the United States.

MOTION FILED
APR 6 1990

No. 89-1448

In The

Supreme Court of the United States

October Term, 1989

VIRGINIA BANKSHARES, INC., et al.,

Petitioners,

v.

DORIS I. SANDBERG, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

and

BRIEF FOR THE AMERICAN CORPORATE COUNSEL ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

NANCY A. NORD
(Counsel of Record)
Executive Director
American Corporate Counsel Association
1225 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 296-4523

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

No. 89-1448

In The

Supreme Court of the United States

October Term, 1989

VIRGINIA BANKSHARES, INC., et al.,

Petitioners,

v.

DORIS I. SANDBERG, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 37.2 of the Rules of this Court, the American Corporate Counsel Association respectfully moves for leave to file the attached brief amicus curiae. Counsel for petitioners has granted consent to file. Consent was requested from counsel for respondents, but no response to that request has been received.

ACCA is a national bar association with 34 local chapters across the country, which is devoted exclusively to the professional activities of attorneys on the legal staffs of corporations and other business entities in the private sector. ACCA has approximately 7,800 members employed as corporate counsel by some 3,500 organizations. Many of these members are the chief legal officers of their client corporations. In their professional activities, members of ACCA are confronted on a regular basis with issues concerning the disclosure of material facts required by the federal securities laws, including federal proxy legislation. ACCA's members are intimately involved in giving legal advice and formulating company policy on disclosure matters and in advising management on pending litigation.

ACCA's members have a strong interest in defending state corporate governance statutes that limit civil liabilities of corporate officers and directors. Like 37 other states, Virginia has placed a ceiling on directors' and officers' liabilities to encourage competent persons to assume positions of responsibility in business corporations and to avoid chilling their performance of duty. The sweeping implied cause of action recognized by the lower courts in this case nullifies these statutory protections and exposes ACCA's members' clients to liabilities that are contrary to state public policy.

The attached amicus curiae brief addresses the federalism issues raised by the court of appeals' ruling from the perspective of persons who have direct experience with the practical impact of stockholder litigation and

state legislation designed to place reasonable constraints on such litigation.

Respectfully submitted,

NANCY A. NORD
(Counsel of Record)
Executive Director
American Corporate Counsel Association
1225 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 296-4523

TABLE OF CONTENTS

	Page
STATEMENT OF INTEREST	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
CONCLUSION	9

TABLE OF AUTHORITIES

Page

CASES:

CTS Corp. v. Dynamics Corp., 481 U.S. 69 (1987) 5

Santa Fe Industries, Inc. v. Green, 430 U.S. 462 (1977) 2, 5, 8

STATUTES:

Ariz. Rev. Stat. Ann. §10-054(A)(9) (Supp. 1989) A-1

Ark. Stat. Ann. §4-27-202(B)(3) (Supp. 1989) A-1

Cal. Corp. Code (West Supp. 1990)

§204(a)(10) A-1

§204.5 ..... A-1

Colo. Rev. Stat. §7-3-101(u) (Supp. 1989) A-1

Del. Code Ann. tit. 8, §102(b)(7) (Supp. 1988) A-1

Fla. Stat. Ann. §607.1645 (West 1990) A-2

Ga. Code Ann. §14-2-202(b)(4) (1989) A-2

Idaho Code §30-1-54(2) (Supp. 1989) A-2

Ind. Code Ann. §23-1-35-1(e) (Burns Supp. 1988) 6, A-2

Iowa Code Ann. (West Supp. 1989)

§491.5(8) A-2

§496A.49(13) A-2

TABLE OF AUTHORITIES – Continued

Page

Kan. Stat. Ann. §17-6002(b)(8) (1988) A-2

La. Rev. Stat. Ann. §12:24(c)(4) (West Supp. 1990) ... A-2

Me. Rev. Stat. Ann. tit. 13-A, §716 (Supp. 1989) A-2

Md. Corps. & Ass'ns Code Ann. (Supp. 1989)

§2-104(b)(8) A-3

§2-405.2 ..... A-3

Mass. Gen. Laws Ann. ch. 156B, §13(b)(1½) (West Supp. 1989) A-3

Mich. Comp. Laws Ann. §450.1209(c) (West Supp. 1989) A-3

Minn. Stat. Ann. (West Supp. 1990)

§302A.111(4)(u) A-3

§302A.251(4) A-3

Mont. Code Ann. (1989)

§35-1-202(2)(a)(v) A-3

§35-1-202(2)(b) A-3

Neb. Rev. Stat. §21-2035(2) (Supp. 1988) A-3

Nev. Rev. Stat. Ann. (Michie Supp. 1989)

§78.036(1) 6

§78.037(1) A-3

N.J. Stat. Ann. §17-9A-3(A)(10) (West Supp. 1989) ... A-3

TABLE OF AUTHORITIES – Continued

Page

N.M. Stat. Ann. §53-12-2(E) (Supp. 1989) A-4

N.Y. Bus. Corp. Law §402(b) (McKinney Supp. 1990) A-4

N.C. Gen. Stat (1990)

§55-2-02(b)(3) A-4

§55-8-30(e) A-4

Ohio Rev. Code Ann. §1701.59(D) (Anderson Supp. 1989) 6, A-4

Okla. Stat. Ann. tit. 18, §1006(B)(7) (West. Supp. 1990) A-4

Or. Rev. Stat. Ann. §60.047(2)(c) (1988) A-4

42 Pa. Cons. Stat. Ann. §8364 (Purdon Supp. 1989) ... A-4

R.I. Gen. Laws §7-1.1-48(a)(6) (Supp. 1988) A-4

S.D. Codified Laws Ann. §47-2-58.8 (Supp. 1989) ... A-5

Tenn. Code Ann. §48-12-102(b)(3) (1988) A-5

Tex. Rev. Civ. Stat. Ann. art. 1302-7.06 (Vernon Supp. 1990) A-5

Utah Code Ann. §16-10-49.1 (Supp. 1989) A-5

Va. Code Ann. §13.1-692.1 (1989) 5, A-5

Wash. Rev. Code Ann. §23A.12.020(10)(d) (Supp. 1989) A-5

Wis. Stat. Ann. §180.307 (West Supp. 1989) A-5

Wyo. Stat. §17-16-834 (1989) A-5

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS:

Goolsby, *Virginia Corporation Law & Practice* (Prentice-Hall) 5, 6

Hanks, *Evaluating Recent State Legislation on Director and Officer Liability Limitation and Indemnification*, 43 Bus. Law. 1207 (1988) 6

Note, *New York's Response to the Director and Officer Liability Crisis*, 54 Brooklyn L. Rev. 1305 (1989) 7

Note, *The Limitation of Directors' Liability: A Proposal for Legislative Reform*, 66 Tex. L. Rev. 411 (1987) 7

No. 89-1448

In The

Supreme Court of the United States

October Term, 1989

VIRGINIA BANKSHARES, INC., et al.,

Petitioners,

v.

DORIS I. SANDBERG, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR THE AMERICAN CORPORATE COUNSEL ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST

As explained in the foregoing motion for leave to file a brief amicus curiae, the members of the American Corporate Counsel Association ("ACCA") have a strong interest in the issues raised by the petition for a writ of certiorari. The court of appeals' ruling raises significant

uncertainties regarding the performance of ACCA's members' corporate responsibilities and also frustrates state legislation designed to protect the officers and directors they counsel against unconstrained liabilities harmful to shareholders, depositors, and employees of affected companies.

SUMMARY OF ARGUMENT

By its recognition of an implied federal cause of action that greatly exceeds the scope of prior decisions of this Court and other circuits, the court of appeals has disregarded legislation of the Commonwealth of Virginia designed to protect against the adverse effects of open-ended civil liabilities for corporate officers and directors. This Court has warned against creation of implied causes of action that usurp the public policies embodied in state laws and has insisted on application of principles of federalism in this very context. The Fourth Circuit's disregard of these principles of federalism brings its ruling into conflict with this Court's decision in *Santa Fe Industries v. Green*, 430 U.S. 462 (1977).

The Virginia corporate governance statutes that have been circumvented by the Fourth Circuit's ruling do not stand alone. As explained in this brief, 37 other states have adopted similar laws as part of recent corporate law reform initiatives. These statutes protect shareholders, depositors and employees of affected companies by constraining liabilities that deter competent persons from assuming positions of responsibility in business corporations.

The decision of the court of appeals has profound importance to corporate counsel and their clients. This Court should grant the petition for certiorari and reverse the erroneous ruling of the court of appeals.

ARGUMENT

The gist of the complaint in these cases is that minority shareholders of the First American Bank of Virginia received inadequate compensation for their shares when the bank merged with a subsidiary of its parent company holding 85% of the outstanding shares, and that the bank's directors labored under a conflict of interest when they approved the merger. These are the traditional elements of a state-law complaint for appraisal or breach of fiduciary duty.

The Fourth Circuit went to extraordinary lengths to convert these claims into federal securities claims. First, it accepted the boot-strap theory that the bank's directors committed securities fraud by failing in the proxy statement to characterize their own conduct as a breach of fiduciary duty, and by affirmatively characterizing the transaction they approved as "fair." Second, the court found that millions of dollars in damages must be paid for the alleged defects in the proxy statement, even though the individual plaintiff concededly had not relied upon the proxy statement (indeed, had affirmatively voted against the proposed merger), the vote of the minority shareholders could not have influenced the merger, and the shareholders had tried without success to

enjoin the merger or secure an appraisal remedy in Virginia court.

The practical effect of "federalizing" this controversy through these theories is to nullify carefully considered policy determinations of the Virginia legislature and to encourage the circumvention of state courts in the resolution of state-law claims. As explained by the Virginia Circuit Court, the Virginia General Assembly, in order to protect depositors against impairment of bank capital, has withheld an appraisal remedy of the very type now mandated by the Fourth Circuit. Pet. App. 32a. Moreover, the Virginia legislature has placed a cap on the liability of corporate directors at $100,000 (or one-year's compensation) to protect against unlimited personal liabilities. *Id.* at 23a. The Fourth Circuit's creation of an implied remedy under the federal securities laws runs roughshod over both of those limitations. Ironically, the court below acknowledged that these limitations applied precisely to this fact situation, yet it applied them only to the stockholders' state-law claims and placed no limitations whatsoever on their "implied" federal cause of action. *Id.* at 23a, 29a.

The Fourth Circuit's expansive ruling threatens to undermine not only the legislative policies of the Commonwealth of Virginia, but also those of many other states that have struggled to restrain the sharp escalation in directors' liability. If state-law claims may be transmuted into securities claims by the boot-strap theories employed in these cases, the corporate law of these states will suffer serious and unjustifiable injury.

As this Court has explained, "[c]orporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law *expressly* requires certain responsibilities of directors with respect to shareholders, state law will govern the internal affairs of the corporation." *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 479 (1977). "A state has an interest in promoting stable relationships among the parties involved in the corporations it charters," and "[e]very State in this country has enacted laws regulating corporate governance." *CTS Corp. v. Dynamics Corp.*, 481 U.S. 69, 89, 91 (1987). Among the most important corporate governance statutes enacted in the last decade are laws designed to shield corporate directors against excessive civil liabilities.

When Virginia passed its director liability law, "the market for directors' and officers' liability insurance was in disarray." Goolsby, *Virginia Corporation Law & Practice* §10.1, p. 126 (Prentice-Hall). The people of Virginia perceived a pressing need for liability reform because of "genuine concern that a mistake in judgment, when viewed with the benefit of hindsight, could trigger financial ruin for individual directors." *Id.* at 127. The Virginia General Assembly responded by imposing a mandatory cap on liability and by allowing shareholders to further reduce damages exposure by amending corporate bylaws. The legislature made an exception only for "knowing" and "willful" misconduct. Va. Code Ann. §13.1-692.1[1]

[1] The Virginia act applies broadly to "any proceeding" brought by or on behalf of shareholders against corporate officers or directors. The legislature withdrew protection only

(Continued on following page)

Virginia's law is part of a national trend. "One of the principal themes of corporate governance in the second half of this decade has been protection of corporate directors and officers from personal liability for money damages." Hanks, *Evaluating Recent State Legislation on Director and Officer Liability Limitation and Indemnification*, 43 Bus. Law. 1207 (1988). In addition to Virginia, Delaware, and Indiana – the first states to adopt such laws – "forty other states have adopted some form of legislation designed to reduce the risks of directors' personal liability for money damages." *Id.* at 1209. Some of these states have adopted self-executing limitations on liability. Others authorize shareholders to adopt their own limitations. *Id.* at 1210.

These laws are not self-serving prescriptions for the personal welfare of corporate directors. Rather, they serve to protect the welfare of *shareholders* by ensuring that they receive the benefit of competent management and reasonable insurance costs. As a result of escalating liability triggered by expansive judicial rulings in the

---

(Continued from previous page)

in narrow circumstances. "Because the unprotected conduct involved intentional wrongdoing, the business leaders were not concerned that such conduct would trigger unlimited liability." Goolsby, *supra* at p. 127 n. 13. Many other states withdraw protection only from willful and wanton conduct. *See e.g.*, Nev. Rev. Stat. §78.036(1) (Supp. 1989) ("intentional misconduct, fraud or a knowing violation of law"); Ind. Code Ann. §23-1-35-1(e) (Burns Supp. 1988) ("willful misconduct or recklessness"); Ohio Rev. Code Ann. §1701.59(D) (Anderson Supp. 1989) ("deliberate intent to cause injury to the corporation or undertaken with reckless disregard for the best interests of the corporation").

early part of the past decade, director and officer (D&O) insurance became prohibitively costly. "For many companies, especially start-up and smaller companies, the insurance was no longer affordable, and some companies were not able – and may still be unable – to obtain quotes at any price. According to the *Wall Street Journal*, premiums for D&O insurance increased over 360% in one year. Almost immediately, outside directors of many major publicly-held corporations began to resign or not stand for re-election rather than continue to serve with inadequate or no insurance." *Id.* at 1209.

Staggering liability risks for board members have had a deleterious impact on the welfare of the companies they serve. "With the onslaught of litigation and lack of protection, some corporations have found it harder not only to prevent directors from resigning, but also to attract talented board members." Note, *New York's Response to the Director and Officer Liability Crisis*, 54 Brooklyn L. Rev. 1305, 1315 (1989).[2] In view of the overriding need to retain qualified directors and to purchase insurance at reasonable cost, shareholders have voted overwhelmingly to protect their interests by exercising statutory options to limit directors' liability. See Note, *The Limitation of Directors' Liability: A Proposal for Legislative Reform*, 66 Tex. L. Rev. 411, 438 (1987) ("Of the corporations that have presented or plan to present charter provisions to shareholders under the new Delaware law, initial

---

[2] This study notes that "[w]hen the Armada Corporation's D&O Policy was cancelled last year, 80 percent of the Board's members resigned in fear of personal liability exposure." *Id.* at 1316 n.62.

signs indicate that nearly ninety percent [of those corporations] have opted for no-liability provisions").[3]

The broad-based reform movement to rationalize liability rules applicable in stockholder litigation would suffer a stunning setback if the Fourth Circuit's judgment in this case were permitted to stand. By inviting into federal court this thinly-disguised controversy over breach of fiduciary duty, the Fourth Circuit has eviscerated Virginia's policy determination that appraisal remedies should *not* be available in bank merger cases and that individual directors should *not* be exposed to unconstrained class action liabilities. It also has encouraged litigants wishing to sidestep state courts to bring their state-law complaints into already over-burdened federal courts under an implied cause of action theory. It is a profound understatement to say, as in *Santa Fe Industries*, that "this extension of the federal securities laws would overlap and quite possibly interfere with state corporate law." 430 U.S. at 479.

---

[3] The chart set forth in the appendix to this brief summarizes liability restrictions in 37 states. The policies of those states would be circumvented by the Fourth Circuit's ruling in this case. That ruling could be used to transform almost any claim of breach of fiduciary duty into a federal securities case. Evasion of state law liability limitations would become an exercise in artful pleading.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

NANCY A. NORD
(Counsel of Record)
Executive Director
American Corporate Counsel Association
1225 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 296-4523

April 6, 1990

APPENDIX

STATE STATUTES LIMITING CIVIL LIABILITIES OF CORPORATION DIRECTORS*

ARIZONA Ariz. Rev. Stat. Ann. §10-054(A)(9) (Supp. 1989)	Charter Option
ARKANSAS Ark. Stat. Ann. §4-27-202(B)(3) (Supp. 1989)	Charter Option
CALIFORNIA Cal. Corp. Code §§204(a)(10), 204.5 (West Supp. 1990)	Charter Option
COLORADO Colo. Rev. Stat. §7-3-101(u) (Supp. 1989)	Charter Option
DELAWARE Del. Code Ann. tit. 8, §102(b)(7) (Supp. 1988)	Charter Option

---

* "Charter option" statutes permit shareholders to curtail or eliminate liability by charter amendment. "Self executing" statutes operate by their own force to curtail liabilities.

FLORIDA Fla. Stat. Ann. §607.1645 (West 1990)	Self-Executing
GEORGIA Ga. Code Ann. §14-2-202(b)(4) (1989)	Charter Option
IDAHO Idaho Code §30-1-54(2) (Supp. 1989)	Charter Option
INDIANA Ind. Code Ann. §23-1-35-1(e) (Burns Supp. 1988)	Self-Executing
IOWA Iowa Code Ann. §§491.5(8), 496A.49(13) (West Supp. 1989)	Charter Option
KANSAS Kan. Stat. Ann. §17-6002(b)(8) (1988)	Charter Option
LOUISIANA La. Rev. Stat. Ann. §12:24(c)(4) (West Supp. 1990)	Charter Option
MAINE Me. Rev. Stat. Ann. tit. 13-A, §716 (Supp. 1989)	Self-Executing

MARYLAND Md. Corps. & Ass'ns Code Ann. §§2-104(b)(8), -405.2 (Supp. 1989)	Charter Option
MASSACHUSETTS Mass. Gen. Laws Ann. ch. 156B, §13(b)(1½) (West Supp. 1989)	Charter Option
MICHIGAN Mich. Comp. Laws Ann. §450.1209(c) (West Supp. 1989)	Charter Option
MINNESOTA Minn. Stat. Ann. §§302A.111(4)(u), .251(4) (West Supp. 1990)	Charter Option
MONTANA Mont. Code Ann. §35-1-202(2)(a)(v), (2)(b) (1989)	Charter Option
NEBRASKA Neb. Rev. Stat. §21-2035(2) (Supp. 1988)	Charter Option
NEVADA Nev. Rev. Stat. Ann. §78.037(1) (Michie Supp. 1989)	Charter Option
NEW JERSEY N.J. Stat. Ann. §17-9A-3(A)(10) (West Supp. 1989)	Charter Option

NEW MEXICO N.M. Stat. Ann. §53-12-2(E) (Supp. 1989)	Charter Option
NEW YORK N.Y. Bus. Corp. Law §402(b) (McKinney Supp. 1990)	Charter Option
NORTH CAROLINA N.C. Gen. Stat. (1990) §§55-2-02(b)(3), 55-8-30(e)	Charter Option
OHIO Ohio Rev. Code Ann. §1701.59(D) (Anderson Supp. 1989)	Self-Executing
OKLAHOMA Okla. Stat. Ann. tit. 18, §1006(B)(7) (West. Supp. 1990)	Charter Option
OREGON Or. Rev. Stat. Ann. §60.047(2)(c) (1988)	Charter Option
PENNSYLVANIA 42 Pa. Cons. Stat. Ann. §8364 (Purdon Supp. 1989)	Charter Option
RHODE ISLAND R.I. Gen. Laws §7-1.1-48(a)(6) (Supp. 1988)	Charter Option

SOUTH DAKOTA S.D. Codified Laws Ann. §47-2-58.8 (Supp. 1989)	Charter Option
TENNESSEE Tenn. Code Ann. §48-12-102(b)(3) (1988)	Charter Option
TEXAS Tex. Rev. Civ. Stat. Ann. art. 1302-7.06 (Vernon Supp. 1990)	Charter Option
UTAH Utah Code Ann. §16-10-49.1 (Supp. 1989)	Charter Option
VIRGINIA Va. Code Ann. §13.1-692.1 (1989)	Self-Executing
WASHINGTON Wash. Rev. Code Ann. §23A.12.020(10)(d) (Supp. 1989)	Charter Option
WISCONSIN Wis. Stat. Ann. §180.307 (West Supp. 1989)	Self-Executing
WYOMING Wyo. Stat. §17-16-834 (1989)	Charter Option

Supreme Court, U.S.
FILED
APR 13 1990
CLERK

No. 89-1448 (5)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

VIRGINIA BANKSHARES, INC., *et al.*,
Petitioners,
v.
DORIS I. SANDBERG,
Respondent.

FIRST AMERICAN BANK OF VIRGINIA, INC., *et al.*,
Petitioners,
v.
PAUL H. WEINSTEIN, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

OPPOSITION TO MOTIONS TO FILE BRIEFS AMICUS CURIAE

JOSEPH M. HASSETT *
JOHN C. KEENEY, JR.
GEORGE H. MERNICK, III
DAVID G. LEITCH
ALBERT W. TURNBULL
HOGAN & HARTSON
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5643
Counsel for Respondents

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1448

VIRGINIA BANKSHARES, INC., *et al.*,
Petitioners,

v.

DORIS I. SANDBERG,
Respondent.

FIRST AMERICAN BANK OF VIRGINIA, INC., *et al.*,
Petitioners,

v.

PAUL H. WEINSTEIN, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

OPPOSITION TO MOTIONS TO FILE BRIEFS AMICUS CURIAE

Respondents Doris I. Sandberg and Paul H. Weinstein, *et al.* (collectively, "respondents"),[1] respectfully request that this Court deny the motions of the American Corporate Counsel Association ("ACCA") and the American Bankers Association and the Association of Bank Holding Companies ("the Banking Associations") for leave to file briefs amicus curiae on the grounds that, as shown more

---

[1] For the list of corporations required by Supreme Court Rule 29.1, see the Petition and the Brief in Opposition.

specifically below, the tendered briefs do not comply with this Court's Rule 37.1.

Rule 37.1 requires that an amicus brief in support of a petition for certiorari present relevant matter not presented by the parties. The would-be amicus briefs at issue here, however, merely repeat and elaborate partisan arguments of the petitioners. The brief tendered by the Banking Associations, for example, is premised entirely on slavish acceptance of the factual contentions asserted in the Petition.[2] Once it is recognized that those contentions were rejected by the jury, and that the Court of Appeals held that the evidence supported the verdict that the proxy statement contained material misstatements of fact, the Banking Associations' concern over the adverse consequences of a holding that "it is not enough to disclose material facts . . ." is revealed as no more than an imaginary hook on which to hang a repetition of petitioners' argument.[3]

Similarly, the Proposed Brief of the ACCA simply elaborates an argument already made at pages 11 and 15 of the Petition. Indeed, the content and style of the two proposed briefs (and even the form of the word processing of one of them) so clearly mimic petitioners' brief as to raise the question whether they were prepared by petitioners' counsel. Counsel of record signing the two amicus briefs, and counsel for petitioners, declined to answer that question. *See* Exhibits A, B and C hereto.

---

[2] The Proposed Brief of the Banking Associations repeats the Petition's "subjective motivation" language, without considering that the proxy statement falsely stated that the directors had made a determination that they never made (*see* Brief in Opposition), or that the directors' decision to approve the merger to avoid being replaced was not a subjective one, but was articulated and decided at a meeting of the board. JA 851-52; 873-75; 745-46.

[3] Proposed Brief of the Banking Associations at 15.

Nor do the briefs—or tactics[4]—of these would-be friends of the Court manifest the fairness that ought to animate a brief amicus curiae. For example, the brief of the Banking Associations fails to disclose that banks have been subject to the "proxy requirements of the Securities Exchange Act" since its enactment, and that the 1964 legislation referred to in the brief merely transferred "the administration of [Section 14(a) and other] parts of the Act with respect to banks . . . from the SEC to the various federal banking authorities," *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 157 n.15 (1976).[5]

Denial of the instant motions would discourage ghost-written amicus briefs that do not comply with Rule 37's requirement that a brief amicus curiae provide relevant matter from a perspective larger than that of the parties.

CONCLUSION

For the foregoing reasons, the motions for leave to file briefs amicus curiae should be denied.

Respectfully submitted,

JOSEPH M. HASSETT *
JOHN C. KEENEY, JR.
GEORGE H. MERNICK, III
DAVID G. LEITCH
ALBERT W. TURNBULL
HOGAN & HARTSON
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5643
Counsel for Respondents

* Counsel of Record

---

[4] For example, although respondents informed ACCA in writing on April 6, 1990 that they had not consented to the filing of an amicus brief, ACCA's motion, mailed to respondents on April 7, 1990 (*see* Ex. D), states to the contrary.

[5] Thus, as has never been questioned by petitioners, *J.I. Case Co.* v. *Borak*, 377 U.S. 426 (1964), applies to banks as fully as to any other entity.

EXHIBITS

EXHIBIT A

HOGAN & HARTSON
COLUMBIA SQUARE
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
(202) 637-5600

JOSEPH M. HASSETT
Direct Dial (202) 637-5643

April 9, 1990

VIA TELECOPIER

Nancy Nord, Esq.
Executive Director
American Corporate Counsel Association
1225 Connecticut Avenue, N.W.
Suite 302
Washington, D.C. 20036

Re: Virginia Bankshares, Inc., et al. v.
Doris I. Sandberg, et al., No. 89-1448

Dear Ms. Nord:

This will confirm our telephone conversation at approximately 1:45 PM today in which I inquired whether Mayer, Brown & Platt, counsel for the petitioner in the above matter, drafted the amicus curiae brief submitted over your name as counsel of record for the American Corporate Counsel Association. You refused to answer the question. You also refused to answer my question as to whether the brief bearing your signature was prepared using Mayer, Brown & Platt's word processing facilities.

Very truly yours,

/s/ Joseph M. Hassett
JOSEPH M. HASSETT

JMH/lsl

cc: Stephen M. Shapiro, Esq.

EXHIBIT B

HOGAN & HARTSON
COLUMBIA SQUARE
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
(202) 637-5600

JOSEPH M. HASSETT
Direct Dial (202) 637-5643

April 9, 1990

VIA TELECOPIER

Michael F. Crotty, Esq.
Deputy General Counsel for Litigation
American Bankers Association
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036

Re: Virginia Bankshares, Inc., et al. v.
Doris I. Sandberg, et al., No. 89-1448

Dear Mr. Crotty:

This will confirm our telephone conversation at approximately 1:50 PM today in which you refused to answer my question as to whether the brief filed over your signature on behalf of the American Bankers Association and the Association of Bank Holding Companies was drafted by Mayer, Brown & Platt, counsel for the petitioner in the above matter.

Very truly yours,

/s/ Joseph M. Hassett
JOSEPH M. HASSETT

JMH/lsl

cc: Stephen M. Shapiro, Esq.

EXHIBIT C-1

HOGAN & HARTSON
COLUMBIA SQUARE
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
(202) 637-5600

JOSEPH M. HASSETT
Direct Dial (202) 637-5643

April 9, 1990

VIA TELECOPIER

Stephen M. Shapiro, Esq.
Mayer, Brown & Platt
190 S. LaSalle Street
Chicago, Illinois 60603

Re: Virginia Bankshares, Inc., et al. v.
Doris I. Sandberg, et al., No. 89-1448

Dear Mr. Shapiro:

This will confirm our telephone conversation of approximately 1:55 PM today in which, in response to my question as to whether your firm drafted the amicus curiae briefs filed in the above matter by the American Corporate Counsel Association and, in a joint filing, by the American Bankers Association and the Association of Bank Holding Companies, you stated that you "consulted" with those entities, but declined to discuss the nature and extent of consultation with your "allies." You also declined to say whether either brief was prepared on your firm's word processing facilities.

Very truly yours,

/s/ Joseph M. Hassett
JOSEPH M. HASSETT

JMH/lsl

EXHIBIT C-2

MAYER, BROWN & PLATT
190 South LaSalle Street
Chicago, Illinois 60603-3441

April 10, 1990

Washington
London
New York
Houston
Los Angeles
Tokyo Liaison Office

Stephen M. Shapiro
(312) 701-7327

VIA FACSIMILE

Joseph M. Hassett, Esq.
Hogan & Hartson
Columbia Square
666 Thirteenth Street, N.W.
Washington, D.C. 20004-1109

Re: Virginia Bankshares, Inc., et al. v.
Doris I. Sandberg, et al., No. 89-1448

Dear Mr. Hassett:

I have received your letter of yesterday, which seriously misdescribes the conversation which I had with you regarding the amicus briefs filed in support of the certiorari petition in the above-captioned case. I declined to discuss this subject as a matter of professional principle, and no inference can be drawn from my refusal to discuss your improper question.

If you intend to submit your letter of yesterday to the Supreme Court, I trust that you will also submit a copy of this letter to avoid seriously misleading the Court.

Very truly yours,

/s/ Stephen M. Shapiro
STEPHEN M. SHAPIRO

SCS:eam

cc: Michael F. Crotty, Esq.
Nancy A. Nord, Esq.

EXHIBIT C-3

HOGAN & HARTSON
COLUMBIA SQUARE
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
(202) 637-5600

JOSEPH M. HASSETT
Direct Dial (202) 637-5643

April 10, 1990

VIA TELECOPIER

Stephen M. Shapiro, Esq.
Mayer, Brown & Platt
190 S. LaSalle Street
Chicago, Illinois 60603

Re: Virginia Bankshares, Inc., et al. v.
Doris I. Sandberg, et al., No. 89-1448

Dear Mr. Shapiro:

Your letter of today with respect to the above matter does not dispute my account of what you said to me yesterday but simply adds your hitherto unexpressed rationale for declining to discuss the nature and extent of your consultation with your allies. Nonetheless, I shall be glad to submit your letter to the Supreme Court as you requested.

Sincerely,

/s/ Joseph M. Hassett
JOSEPH M. HASSETT

JMH/lsl

EXHIBIT D

[Postage Meter Dated April 7, 1990]

AMERICAN CORPORATE COUNSEL ASSOCIATION
1225 Connecticut Avenue, N.W.
Suite 302
Washington, D.C. 20036

TO:

Joseph M Hassett
Hogan & Hartson
555 Thirteenth Street NW
Washington, DC 20004

Supreme Court, U.S.
FILED
JUN 25 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1448

In the Supreme Court of the United States

OCTOBER TERM, 1989

VIRGINIA BANKSHARES, INC., ET AL., PETITIONERS,

v.

DORIS I. SANDBERG, ET AL., RESPONDENTS.

FIRST AMERICAN BANKSHARES, INC., ET AL., PETITIONERS,

v.

PAUL H. WEINSTEIN, ET AL., RESPONDENTS.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

JOINT APPENDIX

STEPHEN M. SHAPIRO *
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 463-2000

JOSEPH M. HASSETT *
Hogan & Hartson
555 Thirteenth St., N.W.
Washington, D.C. 20004
(202) 637-5600

* *Counsel of Record*

PETITION FOR WRIT OF CERTIORARI FILED MARCH 15, 1990
CERTIORARI GRANTED APRIL 23, 1990

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1448

VIRGINIA BANKSHARES, INC., ET AL., PETITIONERS,

v.

DORIS I. SANDBERG, ET AL., RESPONDENTS.

FIRST AMERICAN BANKSHARES, INC., ET AL., PETITIONERS,

v.

PAUL H. WEINSTEIN, ET AL., RESPONDENTS.

On Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

TABLE OF CONTENTS *

	Page
Relevant Docket Entries from U.S. Court of Appeals for the Fourth Circuit	1-2
Relevant Docket Entries from U.S. District Court for the Eastern District of Virginia, *Sandberg v. Virginia Bankshares, et al.*	3-5
State Court Amended Complaint	6-18
State Court Rulings	19-28
Protest filed before the Virginia Corporation Commission	29-36
Decision of State Corporation Commission	37-39

---

* The opinions and judgments of the lower courts and the proxy statement were printed in the petition and have not been reproduced here.

TABLE OF CONTENTS—Continued

Page

SANDBERG v. VIRGINIA BANKSHARES, INC., et al.

Excerpt from Transcript of Argument on Defendants' Motion to Dismiss Plaintiff's Initial Federal Complaint 40-41
Federal Court Amended Complaint 42-53
Excerpts from Deposition of Doris I. Sandberg, June 21, 1988 54-55
Excerpts from Deposition of Paul H. Weinstein, June 28, 1988 58-61
Amended Answer of Directors-Defendants 62-70
Defendant Virginia Bankshares, Inc.'s Answers to Plaintiff's First Set of Interrogatories 71-74
Excerpts from Brief in Support of Corporate-Defendants' Motion for Summary Judgment 75-78
Excerpts from Corporate-Defendants' proposed Jury Charges 79-86
Excerpts from Directors'-Defendants' proposed Jury Instructions 87-94

TRIAL PROCEEDINGS

Defendants' Opening Statements to Jury 95-115

PRESENTATION OF PLAINTIFF'S CASE

Testimony of Doris I. Sandberg 116-121
Testimony of Daniel T. Krabill 121-144
Testimony of Vincent Scoffone 144-182
Testimony of Robert G. Stevens 183-198
Testimony of Milton L. Drewer, Jr. 198-240
Testimony of Lathan M. Ewers, Jr. 241-246
Testimony of Janis Orfe 246-250
Testimony of Emanuel A. Baker, Jr. 251-259
Testimony of Michael C. Connor 259-261
Testimony of Stephen G. Yeonas 261-270
Testimony of Joel T. Broyhill 270-273

TABLE OF CONTENTS—Continued

Page

Testimony of Sidney O. Dewberry 273-275
Testimony of Charles T. Lindsay, Jr. 276-278
Testimony of George W. Johnson 278-281
Testimony of Linda H. Michael 281-284
Testimony of E. Guy Ridgely 285-288
Testimony of Glenn W. Saunders 288-290
Testimony of Henry A. Thomas 290-293
Testimony of Robert A. Altman 293-316
Testimony of Jack W. Beddow 316-325
Arguments on Defendants' Motion for Directed Verdict 325-329

PRESENTATION OF DEFENDANTS' CASE

Testimony of Patricia Bragg 329-339
Testimony of Michael C. Connor 339-363
Testimony of Glenn W. Saunders 363-368
Testimony of Charles Henry Smith, Jr. 368-374
Testimony of George W. Johnson 374-379
Testimony of Clark M. Clifford 379-389

PRESENTATION OF PLAINTIFF'S REBUTTAL CASE

Testimony of Daniel T. Krabill 390-394

CLOSING ARGUMENTS, EXHIBITS, AND POST-TRIAL MOTIONS

Plaintiff's Closing Argument 394-410
Corporate-Defendants' Closing Argument 410-412
Directors'-Defendants' Closing Argument 412-415
Transcript of Bench Conference, Sept. 29, 1988 415-419
Jury Instructions and Objections 419-436
Selected Trial Exhibits 437-525
Jury Verdict & Judgment 526-528

TABLE OF CONTENTS—Continued

Page

Brief in Support of Corporate-Defendants' Motion for Judgment Notwithstanding the Verdict 529-531

Excerpts from Transcript of Argument on Motion for Judgment NOV and New Trial 531-534

WEINSTEIN v. FIRST AMERICAN BANKSHARES, INC., et al.

Relevant Docket Entries from U.S. District Court for the Eastern District of Virginia 534-535

U.S. COURT OF APPEALS
FOR THE FOURTH CIRCUIT

M88-2658

DORIS I. SANDBERG, individually and on behalf of other minority stockholders,
Plaintiff-Appellant

v.

VIRGINIA BANKSHARES, INC.; FIRST AMERICAN BANKSHARES, INC.; JACK W. BEDDOW; MILTON L. DREWER, JR.; E. GUY RIDGELY; EMANUEL A. BAKER, JR.; HARRIET F. BRADLEY; JOEL T. BROYHILL; THOMAS B. CHAMBERLIN; THOMAS P. CHISMAN; SIDNEY O. DEWBERRY; ERIC W. ERDOSSY; GEORGE W. JOHNSON; CHARLES T. LINDSAY, JR.; DONALD R. MAXFIELD; LINDA H. MICHAEL; MILTON V. PETERSON; GLENN W. SAUNDERS, JR.; CHARLES H. SMITH, JR.; VERLIN W. SMITH; HENRY A. THOMAS; STEPHEN G. YEONAS,
Defendants-Appellees

and

THOMAS G. MAYS; DWIGHT C. SCHAR,
Defendants

Appeal from Eastern District of Virginia at Alexandria

Filed: 11/30/88

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
11/30/88	Civil case docketed.
6/7/89	Oral argument heard.
12/20/89	CORRECTED opinion issued. Copies to counsel.
1/30/90	Court order filed by KKH, RLV, EAG granting motion to stay mandate.
4/25/90	Supreme Court order filed 04/23/90 granting petition for certiorari. Supreme Court no. 89-1448.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

No. 88-0299

SANDBERG, DORIS I. individually & on behalf of other minority stockholders

v.

VIRGINIA BANKSHARES, INC.,
BEDDOW, JACK W.,
DREWER, MILTON L., JR.,
RIDGELY, E. GUY,
BAKER, EMANUEL A., JR.,
BRADLEY, HARRIET F., *et al.*

RELEVANT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
1988		
Mar. 14		COMPLAINT w/Jury Demand—filed jgs
Mar. 14		SUMMONS (Orig & 23) issued & given to atty for mail service jgs
Apr. 11		NOTICE & ORDER that Defts. Mays & Schar are dismissed from this action w/o prejudice
Apr. 15		ANSWER—filed by Defts. Baker, Beddow, Bradley, Broyhill, Chamberlin, Chisman, Dewberry, Drewer, Erdossy, Johnson, Lindsay, Maxfield, Michael, Peterson, Ridgley, Saunders, Smith, Smith, Thomas & Yeonas

DATE	NR.	PROCEEDINGS
1988		
Apr. 15		ANSWER—filed by Deft. VA Bankshares
Apr. 15		MOTION To Dismiss Count I of Complaint—filed by Deft. VA Bankshares
May 2		NOTICE returnable 5-13-88 together with MOTION TO DISMISS Count I; BRIEF In support of same—filed by Deft. Va. Bankshares, Inc. cc
May 13		TRIAL PROCEEDINGS: This matter came on for hearing on Deft. VA Bankshares, Inc.'s motion to dismiss Count I (joined by remaining defts.). Counsel appeared. Motion argued and denied in part and granted in part.
Jun. 17		TRIAL PROCEEDINGS: Hilton, j. Pltf.'s motion for class certification—denied.
Aug. 19		TRIAL PROCEEDINGS (J. Hilton) This matter came on for hearing on motions. Defts. First American Bankshares, Inc. & Va. Bankshares' motion to dismiss Ct. II of the amended complaint—denied. Defts.' motion for summary judgment re: statute of limitations—denied. Defts. First American Bankshares, Inc. & Va. Bankshares' motion for summary judgment—denied. Director Defts.' motion for summary judgment—denied. Pltf.'s motion to strike defts.' motions for summary judgment—denied.
Sept. 29		JUDGMENT in favor of Pltf. Sandberg against all defts. jointly and severally in the amount of $43,956.00 in accordance with the jury verdict entered by the Clerk and filed.

DATE	NR.	PROCEEDINGS
1988		
Oct. 21		TRIAL PROCEEDINGS: Judge Bryan. Defts. 1st Amer. Bankshares, Inc. and VA Bankshares, Inc.'s motion for a new trial and motion for judgment NOV argued and denied. Director Defts.' motion for judgment NOV and for a new trial argued and denied.
Oct. 21		ORDER in accordance w/trial proceedings—entered and filed
Nov. 15		NOTICE of Appeal to USCA of the orders of 9-29-88 & 6-17-88—filed by Pltf.
Nov. 16		NOTICE of Appeal to USCA of the orders of 9-29-88, 10-21-88—filed by Dir. Defts.
Nov. 16		NOTICE of Appeal to USCA of the orders of 9-29-88 & 10-21-88—filed by Defts. First Am. Bankshares & VA Bankshares
Nov. 18		STIPULATED ORDER that the proceedings of execution on the judgment will be stayed pending appeal to USCA if defts. post a bond in the amt of $43,956.00 w/i 20 days (AVB)—ent & filed

STATE COURT AMENDED COMPLAINT

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

In Chancery No. 101443

PAUL H. WEINSTEIN [*et al.*],
Complainant,

v.

FIRST AMERICAN BANK OF VIRGINIA

and

JACK W. BEDDOW [*et al.*],
Defendants.

AMENDED BILL OF COMPLAINT FOR TEMPORARY INJUNCTION, PERMANENT INJUNCTION AND JUDGMENT

[Filed May 1, 1987]

COME NOW complainants, minority shareholders in the First American Bank of Virginia (the "Bank"), and seek to enjoin defendants from taking action to consummate a purported merger, the purpose of which is to force out the minority shareholders of the Bank at a grossly inadequate price per share and thereby permit the majority shareholder of the Bank, Virginia Bankshares, Inc., to reap all the benefits of ownership of stock in the Bank and deny such benefits to complainants. Immediate injunctive relief is necessary to prevent consummation of the merger, which was submitted to shareholders at a meeting April 21, 1987.

Parties

1. Complainants Paul H. and Roslyn Weinstein are residents of Maryland, and are the owners (individually, jointly, and in representative capacities) of 17,960 shares of stock in the Bank.

2. Complainant Jay Weinstein is a resident of Maryland and is the owner of 730 shares of stock in the Bank.

3. Complainant Richard Weinstein is a resident of Maryland and is the owner of 706 shares of stock in the Bank.

4. Complainant Helen Weinstein is a resident of the District of Columbia and is the owner of 10,001 shares of stock in the Bank.

5. Complainant Leonard Weinstein is a resident of the District of Columbia and is the owner of 3,876 shares of stock in the Bank.

6. Complainant Evelyn Bushwick is a resident of Maryland and is the owner of 8,340 shares of stock in the Bank.

7. Complainants Gary and Carol Plushnick are residents of Maryland and are the owners of 2,516 shares of stock in the Bank.

8. Complainant William B. Dockser is a resident of Maryland and is the owner of 8,300 shares of stock in the Bank.

9. Complainant Laura Lee Cookson is a resident of Maryland and is the owner of 88 shares of stock in the Bank.

10. Complainants Philip and Nancy Gross are residents of Maryland and are the owners of 100 shares of stock in the Bank.

11. Complainants John P. and Kay Kyle are residents of Maryland and are the owners of 1,050 shares of stock in the Bank.

12. Complainant Robert I. Schattner is a resident of the District of Columbia and is the owner of 7,596 shares of stock in the Bank.

13. Defendant First American Bank of Virginia is a bank organized under the laws of Virginia, with its principal office located at 1970 Chain Bridge Road, McLean, Virginia. The Bank has 4,896,287 shares of common stock outstanding. These shares are held of record by 2,039 minority shareholders, including complainants, and the 85% shareholder, Virginia Bankshares, Inc.

14. Defendants Jack W. Beddow, Milton L. Drewer, Jr., E. Guy Ridgley, Emanuel A. Baker, Jr., Harriet F. Bradley, Joel T. Broyhill, Thomas B. Chamberlin, Thomas P. Chisman, Sidney O. Dewberry, Eric W. Erdossy, George W. Johnson, Charles T. Lindsay, Jr., Donald R. Maxfield, Thomas G. Mays, Linda H. Michael, Milton V. Peterson, Glenn W. Saunders, Jr., Dwight C. Shar, Charles H. Smith, Jr., Verlin W. Smith, Henry A. Thomas, and Stephen G. Yeonas are directors of the Bank. These defendants are occasionally collectively referred to hereinafter as the "defendant Directors."

15. Defendant Virginia Bankshares, Inc. (the "85% shareholder"), is a Virginia corporation wholly owned by First American Bankshares, Inc., and is the owner of 4,162,052 shares of stock (85%) in the Bank.

16. Defendant Jack W. Beddow is a director and officer of the Bank and a member of the Board of Directors of First American Bankshares, Inc. Defendant Milton L. Drewer, Jr. is a director of the Bank and a member of the Board of Directors of two other banks owned wholly or partially by First American Bankshares, Inc. Defendant Eric W. Erdossy is a director and officer of the Bank.

Common Factual Allegations

17. Complainant Paul H. Weinstein and his family have owned stock in the defendant Bank and its predecessors for three generations.

18. Complainants' ownership of stock in the Bank is a valuable property right they wish to retain.

19. The 85% shareholder, Virginia Bankshares, Inc., is seeking to acquire all the benefits of ownership of the Bank by means of a merger transaction in which the complainants and other minority shareholders will be required to accept $42 cash per share, while the 85% shareholder will receive stock instead of cash and will thus become the 100% owner of all the Bank's outstanding stock ("the Merger").

20. The defendant Directors approved the proposed Merger and scheduled a shareholders' meeting for April 21, 1987, to seek shareholder approval of the above-described "freeze-out" of minority shareholders.

21. The $42 per share that defendants propose to pay complainants and other minority shareholders is far less than the true value of the shares. Complainants have obtained a preliminary assessment by the respected bank consulting firm, Golembe Associates, Inc., which indicates that the fair price of their shares is approximately 33% to 40% higher than the $42 price defendants are seeking to impose on complainants.

22. Defendant Virginia Bankshares, Inc., as the holder of 85% of the stock of the Bank, owes fiduciary duties to the complainant minority shareholders, including the duties not to obtain any benefit at their expenses, not to force them to terminate their investment in the Bank for its own benefit, and not to force them to accept an unfair price for their shares. Defendant Virginia Bankshares, Inc. is breaching these duties by forcing complainants to terminate their stockholder interests in the Bank for its benefit, and to their detriment, and by im-

posing upon them a price for their shares that is grossly unfair.

23. The defendant Bank and its directors have fiduciary duties to the complainant minority stockholders, including the duty to act fairly and carefully with respect to efforts of the 85% shareholder to freeze out the minority stockholders. In breach of such duties, the defendant Bank and its directors are assisting the 85% shareholder to freeze out the minority without any corporate purpose and have failed to conduct any independent investigation of the fairness of the proposed Merger and, specifically, failed to retain any independent financial advisor to advise the Directors as to the fairness of the plan and of the price being imposed on the minority stockholders.

24. Instead, the defendant Directors, in violation of their duties of care and loyalty to minority shareholders, relied on the investment banker hired by the 85% shareholder, despite the fact that it is the Directors' duty to protect the interest of the minority shareholders, whose interest is in direct conflict with the interest of the 85% shareholder in paying the minority the lowest possible price.

25. By letter of April 3, 1987, a copy of which is attached as Exhibit 1, complainant Paul H. Weinstein, pursuant to his right as a shareholder under Va. Code §§ 13.1-770 *et seq.*, requested permission to inspect corporate documents pertinent to the fairness, honesty, and regularity of the proposed Merger.

26. As fiduciaries, defendant Directors were required to permit complainants to inspect such documents.

27. By letter of April 13, 1987, a copy of which is attached as Exhibit 2, defendant Directors, without explanation or justification, refused to provide complainants with access to the requested documents, except for

two pro-forma documents obviously designed to conceal rather than reveal information.

28. Defendants' conduct with respect to the proposed freeze-out merger is fraudulent in that, among other things,

(a) defendant Directors have maintained the Bank's stock price at an artificially low level by failing to increase the Bank's dividends since 1984 even though the Bank's earnings increased from $3.67 per share in 1984 to $5.10 per share in 1986;

(b) defendant Directors' proxy statement for the April 21 meeting asserts that minority shareholders have no statutory appraisal remedy as an alternative to the $42 price per share dictated by the 85% shareholder, but fails to disclose that the law does not leave minority shareholders totally at the mercy of the 85% shareholder, but grants them a right to seek a remedy in this Court;

(c) defendants have failed promptly to disclose their intention to bring about a merger as required by section 13 of the Securities Exchange Act of 1934;

(d) defendants have proposed a freeze-out of the minority shareholders at a grossly inadequate price which operates as a fraud on complainants in violation of defendants' fiduciary duties; and

(e) in breach of their fiduciary duties, defendant Directors have denied complainant-stockholders' request for permission to inspect corporate records pertinent to the fairness, honesty, and regularity of the Merger.

COUNT I

29. Paragraphs 1 through 28 of this Bill of Complaint are incorporated as if fully set forth herein.

30. Defendant Directors have refused to permit complainants to inspect and copy corporate records to which

complainants, as stockholders, are entitled to have access for the proper corporate purpose of assisting them in taking steps necessary to protect their interest with respect to a fundamental change in their status as stockholders. Those documents are:

(a) all documents prepared by or on behalf of the Bank, its Board of Directors or any committee thereof with respect to the Merger;

(b) all appraisals, analyses, reviews or other documents referring or relating to the value, market value, price, fair value or fair price of shares of common stock of the Bank ("Common Stock");

(c) all documents received by the Bank, its Board of Directors or any committee thereof from any investment bankers or financial adviser, including Keefe, Bruyette & Woods, in connection with the Merger or such advisers' evaluation or review of the Merger or the value or price of shares of Common Stock; and

(d) all documents supplied by the Bank, its Board of Directors or any committee thereof to any investment bankers or financial advisers, including Keefe, Bruyette, & Woods, in connection with the Merger or such advisers' evaluation or review of the Merger or the value or price of shares of Common Stock.

31. The defendant Bank had no reasonable basis for doubting the right of complainants to inspect the foregoing records.

32. Pursuant to Va. Code § 13.1-773, complainants pray for an order summarily ordering inspection and copying at the Bank's expense and ordering the Bank to pay complainants' costs, including reasonable counsel fees, incurred to obtain such order.

COUNT II

33. The allegations contained in paragraphs 1 through 32 of this Bill of Complaint are incorporated as if fully set forth herein.

34. Defendants owe fiduciary duties of loyalty and care to complainants.

35. Defendants have breached, and threaten to continue to breach, those duties by proposing, approving and seeking to consummate the Merger in that,

(a) the "freeze-out" of the complainant minority shareholders benefits the 85% shareholder to the detriment of the minority shareholders without benefit to the corporation as a whole;

(b) the proposed plan of merger calls for payment of a price per share to complainant-minority shareholders that is grossly inadequate and unfair in relation to the true value of complainants' shares; and

(c) defendant Directors have submissively, and in violation of their duties to minority stockholders, accepted the price per share offered to be paid to the minority shareholders by the 85% shareholder without making an adequate investigation of their own as to the fairness of that price.

36. Complainants have no adequate remedy at law because, unless enjoined, defendants will consummate the merger and force complainants to forfeit their stock ownership in the Bank, against their will and at a grossly inadequate price.

COUNT III

37. The allegations contained in paragraphs 1 through 36 of this Bill of Complaint are incorporated as if fully set forth herein.

38. If defendants are permitted to force complainants to surrender their stock ownership in the defendant Bank for cash, complainants are entitled to receive the fair value of their stock as determined by this Court after trial.

39. Failure to require defendants to pay complainants the fair value of their stock in the Bank would deprive complainants of their property without due process of law in violation of the Fourteenth Amendment of the United States Constitution and in violation of Va. Const. art. 1, 11.

Prayer For Relief

WHEREFORE, complainants pray

(a) that a temporary and permanent injunction be issued

(i) ordering defendants to produce immediately to complainants the documents identified in paragraph 30 of this Bill of Complaint and to pay complainants all expenses, including a reasonable award for attorneys fees, in prosecuting this action; and either

(ii) enjoining defendants from taking any action to consummate the merger submitted to shareholders at the shareholders' meeting April 21, 1987; or alternatively,

(iii) enjoining defendants from taking any action to effect any merger of the Bank with any other entity pursuant to any plan of merger that does not provide minority shareholders with a fair price per share as determined by this Court.

(b) that, if the merger is not enjoined, this Court order defendants to pay complainants a fair price, as determined by this Court, for their stock in the Bank; and

(c) that the Court grant such further relief as the Court deems just.

Respectfully submitted,

PAUL H. WEINSTEIN
By Counsel

HOGAN & HARTSON

By: /s/ Joseph M. Hassett
JOSEPH M. HASSETT
JOHN C. KEENEY, JR.
WENDY L. WYSONG
DOUGLAS B. FARQUHAR

8300 Greensboro Drive
Suite 1100
McLean, Virginia 22102
(202) 331-4500

Dated: April —, 1987

EXHIBIT 1
April 3, 1987

Milton L. Drewer, Jr.
Chairman of the Board and
Chief Executive Officer
First American Bank of Virginia
1970 Chain Bridge Road
McLean, Virginia 22102

Dear Mr. Drewer:

I have just received the Notice of Annual Meeting of Shareholders concerning the proposed merger of First American Bank of Virginia ("First American") in a transaction that would force out the minority shareholders for $42 per share. Members of my family have been shareholders of First American for three generations, and collectively we are one of the largest of the minority shareholders of First American.

We object to being eliminated as stockholders of First American, and we consider the $42 price to be totally inadequate and to evidence a complete disregard for the rights of the minority shareholders. You cannot allow management to continue with this merger consistent with the good faith exercise of your fiduciary duties as directors and your obligations under federal and state securities and banking laws.

I myself have been a shareholder of record for at least six months immediately preceding the date of this letter. Pursuant to Sections 13.1-770 *et seq.* of the Virginia Stock Corporation Act, I hereby request that you promptly furnish to me the following:

1. The minutes of all meetings of the Board of Directors of First American or its Executive Committee at which any matter or action in connection with Agreement and Plan of Merger dated February 12, 1987 among Virginia Bankshares, Inc., FAB Acquisition Bank and

First American (the "Merger Agreement") or the merger to be effected thereby (the "Merger") was discussed.

2. All documents prepared by or on behalf of First American, its Board of Directors or any committee thereof with respect to the Merger.

3. All appraisals, analyses, reviews or other documents referring or relating to the value, market value, price, fair value or fair price of shares of common stock of First American ("Common Stock").

4. All documents received by First American, its Board of Directors or any committee thereof from any investment bankers or financial advisers, including Keefe, Bruyette & Woods, in connection with the Merger or such advisers' evaluation or review of the Merger or the value or price of shares of Common Stock.

5. All documents supplied by First American, its Board of Directors or any committee thereof to any investment bankers or financial advisers, including Keefe, Bruyette, & Woods, in connection with the Merger or such advisers' evaluation or review of the Merger or the value or price of shares of Common Stock.

In the alternative, I request that such documents be made available for inspection and copying by my agent or attorney during First American's regular business hours commencing no later than five business days from your receipt of this letter until such inspection and copying is complete.

I am willing to pay a reasonable charge, covering the costs of labor and material, for copies of any documents provided to me pursuant to this request.

The purpose of this request is to assist me in taking such steps as are necessary to protect my interests as a minority shareholder with respect to the proposed Merger.

Please promptly advise my attorneys, Joseph M. Hassett or John C. Keeney, Jr. of Hogan & Hartson, at (202) 331-4500, of the name of your attorney or other person with whom we may arrange compliance with this request.

Your immediate attention to this matter is requested.

Very truly yours,

/s/ Paul H. Weinstein
JUDGE PAUL H. WEINSTEIN

STATE COURT RULINGS

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

In Chancery No. 101443

PAUL H. WEINSTEIN, *et al.*,
Complainants,

v.

FIRST AMERICAN BANK OF VIRGINIA, *et al.*,
Defendants.

DECREE

This cause came on to be heard on April 16, 1987, upon the verified Bill of Complaint, Motion for Temporary Injunction, Memorandum of Points and Authorities in Support of Motion for Temporary Injunction, Affidavit of Paul H. Weinstein (with attached Exhibits) all of which were filed in this Court's clerk's office on April 15, 1987; and upon appearance of complainants, by counsel, and of defendants, First American Bank of Virginia, its Board of Directors as a board, and Milton L. Drewer, by counsel; and counsel argued whether this Court should grant the relief requested by the Bill of Complaint or as requested by the Motion for Temporary Injunction.

And it appearing to the Court based on the papers filed by the parties, and the evidence presented to the Court, that (1) no irreparable harm has been shown, (2) there is no substantial likelihood of complainants' prevailing on the merits, and (3) there has been no

showing of fraud, either by clear or convincing evidence or otherwise, and for the other reasons stated from the Bench and contained in the attached transcript, it is therefore

ORDERED, ADJUDGED and DECREED that:

1. The Motion for Temporary Injunction is denied.
2. The prayers for relief set forth in Counts I and II of the Bill of Complaint are denied.
3. This cause is continued for further proceedings under Count III of the Complaint.

ENTERED this —— day of May 1987.

_____

Judge

EXCERPTS FROM TRANSCRIPT OF JUDGE FITZPATRICK'S RULING, APRIL 17, 1987

* * * *

[3] THE COURT: It is an interesting issue, and an interesting but lengthy case, but this is how it is going to have to be resolved.

First of all, no injunction will be entered. I find that there is no irreparable harm that is shown, and I don't find a substantial likelihood of prevailing on the merits of what is alleged.

I don't believe that I can stop this merger without a showing of fraud, and there is no showing of fraud, either clear or convincing or otherwise that would entitle me to step in and prevent this meeting.

I do not think that the Berkowitz case is probably going to be law in Virginia based on the way that the banking industry has been treated here.

[4] To make a per se finding of a freezeout as being tantamount to fraud I think is just not the way it is going to go. And while it seems to be a very fair case in resolution I don't find that the Berkowitz rule should be adopted in this case.

The question really, and I could go and make other findings, although I think they are somewhat superfluous, but I cannot look at either what has been presented in evidence that the $42 share price would amount to either a price that is too low on its face or too high on its face for what is involved here.

I cannot find that that was a fair price or not a fair price, but it certainly does not amount to anything that would rise to fraud.

The real issue I think that remains is is there any other remedy for this plaintiff, in this type of situation.

I think that without ruling there is or is not, I believe there is an adequate remedy at law, and that is that subsequent to the actions that are taken there is a potential suit for fraud if the issues can be proved, that

there is a way to get a monetary value that is in dispute here, the difference between the $42 per share and what [5] would be the fair-market value of the stock.

I also am not ruling at this time that you cannot get a hearing on the side of equity as to what would be a fair-market price, because frankly I don't know the answer to that.

But at this point it would not be a portion of any injunction, but I would not preclude you from filing a suit that specifically asked for that relief, and then have to make a determination at a later time whether that is an appropriate remedy available to you in equity or whether the law remedy is sufficient on its own.

I don't think that is an issue that we have to get to today.

In terms of viewing the records of the company, I am going through it as quickly as I can, and looking at it it appears that the bank has complied with the applicable statutes, and has provided you those things that it is required to do so.

That ruling does not mean that if there is a suit filed in law, that any discovery issues have been ruled on as to whether those issues or that information would be available under the discovery rules. It may very well be, but not under these circumstances.

[6] So basically the motion for a temporary injunction is denied. The issue as to whether the corporate books and records need to be made available more prior to the meeting on Tuesday at this point is denied without preventing you from pursuing any remedies that you may have at law.

All right, any questions?

MR. KEENEY: Yes, Your Honor.

In the nature of a question, I heard what your Honor said with respect to not precluding a suit asking specifically for the equitable relief.

Your Honor, we think Count Three of our present suit asks specifically for that.

THE COURT: It might, but I will tell you that I am not going forward with it today.

MR. KEENEY: And I was not asking that, Your Honor.

THE COURT: It may be a remedy. I won't dismiss that suit outright, that portion of it today, because frankly I don't know the answer. I don't think you get an accounting under the statutes and the law as it is.

I have not really had time to ruminate over whether there is some sort of other remedy that might be [7] available to you.

I think that you have an action at law for damages, but I am not going to rule at this point. In fact, if you want to you can just say I have taken that one under advisement until a later time.

But as to the injunction which is the real issue today, that is denied.

* * * *

NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Judicial Center
4110 Chain Bridge Road
Fairfax, Virginia 22030

County of Fairfax City of Fairfax City of Falls Church

Barnard F. Jennings
William G. Plummer
Thomas J. Middleton
Richard J. Jamborsky
Lewis Hall Griffith
F. Bruce Bach
Quinlan H. Hancock
Johanna L. Fitzpatrick
J. Howe Brown
Jack B. Stevens
Thomas A. Fortkort
Judges

James Keith
Lewis D. Morris
Burch Millsap
Retired Judges

October 6, 1987

Wendy L. Wysong, Esq.
John C. Keeney, Jr., Esq.
Joseph M. Hassett, Esq.
Hogan & Hartson
815 Connecticut Avenue
Washington, D.C. 20006-4072

Janis Orfe, Esq.
Vice President and
General Counsel
First American Bank
of Virginia
1970 Chain Bridge Road
McLean, Virginia 22102

John S. Stump, Esq.
McGuire, Woods, Battle & Boothe
8280 Greensboro Drive
Suite 900
P. O. Box 9346
McLean, Virginia 22102

Thomas J. Cawley, Esq.
Stephen M. Sayers, Esq.
Hunton & Williams
3050 Chain Bridge Road
Fairfax, Virginia 22030

Michael J. Lyon, Esq.
Clifford & Warnke
815 Connecticut Avenue, N.W.
Washington, D.C. 20006

Re: *Weinstein, et al. v. First American Bank of Virginia, et al.*
Chancery No. 101443

Dear Counsel:

This matter is before the Court on Defendants' Demurrer to Count III of the Amended Bill of Complaint. In Count III, Complainants allege that Defendants breached their fiduciary duty to treat the minority stockholders fairly in selecting the price to be paid for stockholder shares following a freeze-out cash-out merger. After consideration of the oral arguments and memoranda of law, the Defendants' Demurrer is sustained.

Complainants contend that Defendants have a duty to pay fair value for the stock and that Complainants may resort to a court of of equity for enforcement. Both parties acknowledge that Va. Code § 6.1-43 exempts holders of bank shares from the statutory appraisal rights found in Va. Code § 13.1-730. However, Complainants argue that there remains a common law counterpart to statutory appraisal not affected by § 6.1-43. With this, I disagree.

Historically, the appraisal right, a statutory creation, was designed to protect dissenters' interests when legislation was enacted to permit mergers without unanimous consent. Statutory appraisal is now considered the exclusive remedy for stockholders opposing a merger. *See Adams v. United States Distributing Corp.*, 184 Va. 134, 34 S.E.2d 244 (1945), *cert. denied*, 327 U.S. 788 (1946). However, dissenting stockholders in bank mergers do not even have this solitary remedy available to them. Va. Code § 6.1-43 specifically excludes bank mergers from application of § 13.1-730. While the result may seem harsh, this is how the General Assembly chose to balance the competing interests of minority stockholders versus those of the depositing public. Investors who opt to purchase stock in a bank do so with the knowledge that § 13.1-730 is not available to them in the event of a freeze-out. *See The Pittston Co. v. O'Hara*, 191 Va. 886, 63 S.E.2d 34 (1951); *Adams*, 184 Va. at 149, 34 S.E.2d at 251 (well-established that State's corporation law is part of contract between corporation and its stockholders).

The absence of a statutory appraisal remedy is not to be construed as a license to bank directors to set unfair prices. Complainants may have an action at law for damages if they can show that a breach of fiduciary duty or fraud prompted the Board to recommend an inadequate price for the shares. In the present case, however, complainants have not alleged facts sufficient to support either of these claims.

The General Assembly has seen fit to deny the appraisal remedy to dissenters in a bank merger. Complainants may not obtain that which the legislature has taken away by masking their request as the enforcement of an equitable duty.

Mr. Cawley will prepare an order reflecting this decision and submit it to opposing counsel for endorsement.

Very truly yours,

/s/ Johanna L. Fitzpatrick
JOHANNA L. FITZPATRICK

JFL/11r

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

In Chancery No. 101443

PAUL H. WEINSTEIN, *et al.*,
Complainants,

v.

FIRST AMERICAN BANK OF VIRGINIA, *et al.*,
Defendants.

FINAL DECREE

THIS CAUSE came on to be heard on July 23, 1987 for consideration of the demurrers filed by the defendants, the motion to dismiss Counts I and II of the Amended Bill of Complaint, filed by the defendant Virginia Bankshares, Inc. ("Virginia Bankshares"), and certain other pleas filed by various defendants, and

IT APPEARING to the Court there are no outstanding injunctive issues to be decided by this Court for the reasons stated from the bench, and that Prayers for Relief (a)(i), (a)(ii) and (a)(iii), being the relief sought by Counts I and II of the Amended Bill of Complaint, should be denied; and

IT FURTHER APPEARING to the Court, having heard the arguments of counsel, having considered the briefs submitted by the parties to this cause, and having stated its reasons in the letter opinion dated October 6, 1987, that Count III of the Amended Bill of Complaint fails to state a cause of action upon which relief can be granted; it is, therefore,

DECREED that Virginia Bankshares' motion to dismiss Counts I and II of the Amended Bill of Complaint should be, and it hereby is GRANTED; and it is

FURTHER DECREED that the defendants' demurrers to Count III of the Amended Bill of Complaint should be, and they hereby are SUSTAINED, and that the Amended Bill of Complaint is hereby DISMISSED.

AND THIS DECREE IS FINAL.

ENTER.

/s/ Johanna L. Fitzpatrick
JOHANNA L. FITZPATRICK
Judge, Circuit Court
of Fairfax County

Dated: October 16, 1987.

PROTEST BEFORE
VIRGINIA CORPORATION COMMISSION

HOGAN & HARTSON

A Partnership Including Professional Corporations

April 9, 1987

BY HAND

Milton L. Drewer, Jr.
Chairman of the Board and
Chief Executive Officer
First American Bank of Virginia
1970 Chain Bridge Road
McLean, Virginia 22102

Dear Mr. Drewer:

Herewith, for your information, please find a copy of the Notice of Protest we are today filing with the Virginia Corporation Commission with respect to the proposed merger of First American Bank of Virginia (the "Bank") for which approval is being sought at the April 21, 1987 shareholders meeting.

On behalf of our clients, we are prepared to enter into good faith negotiations with you as to an increase in the price per share to be paid to minority stockholders, provided that the Bank promptly postpones the shareholder meeting and withdraws its application for Virginia Corporation Commission approval of the merger.

We would appreciate your response by the close of business tomorrow, April 10, 1987, since, in the absence of the Bank's agreement to the matters described above, it will be necessary to seek relief in the courts.

Very truly yours,

/s/ Joseph M. Hassett
JOSEPH M. HASSETT

HOGAN & HARTSON

April 8, 1987

VIA FEDERAL EXPRESS

Mr. Nicholas Kyrus
Deputy Commissioner
Research and Structure Division
Bureau of Financial Institutions
State Corporation Commission
701 East Byrd Street, Suite 1600
Richmond, Virginia 23219

Re: Application of Virginia Bankshares, Inc. To Acquire Via Merger With a De Novo Subsidiary, FAB Acquisition Bank, 100% of the Voting Shares of First American Bank of Virginia

Dear Sir:

On behalf of our clients, Paul H. Weinstein, members of his family and other individuals, all of whom are shareholders of First American Bank of Virginia (the "Bank") whose holdings are itemized on Exhibit A hereto, this protest is filed, pursuant to Rule 5:4 of the Rules of Practice and Procedure of the State Corporation Commission, in opposition to the application filed by the 85% shareholder of the Bank (Virginia Bankshares, Inc.) for approval of the contemplated merger in which the minority shareholders will be forced out, for no corporate purpose whatsoever, at the grossly inadequate price of $42.00 per share.

As discussed below, the approval by the Bank's Board of Directors of this freeze-out merger, which favors the majority shareholder at the expense of the interests of the minority shareholders, was an egregious breach of fiduciary duty. This breach of fiduciary duty is clearly established by this record in which (1) there is no valid corporate purpose for the freeze-out merger other than to bestow a windfall on the 85% majority shareholder; (2) the purported fairness of the freeze-out price of $42.00 per share is based upon a conclusion of the majority

shareholder's appraiser without independent investigation by the Board of Directors or appointment of an independent appraiser; (3) the $42.00 price per share imposed by the majority shareholder is inadequate and unfair because it fails to take into account the significant past growth and the anticipated future growth of the Bank, and sales prices of comparable institutions with equivalent operating results.

Pursuant to Va. Code Ann. § 6.1-44 the Commission, in issuing or refusing to issue a certificate of authority to do business after a merger, applies the standards set forth in Va. Code Ann. § 6.1-13 for issuing such a certificate of authority to a new bank. Those standards require the Commission to evaluate, *inter alia*, whether there has been compliance with all provisions of law and certain financial and managerial factors, including "the moral fitness, financial responsibility, and business qualifications" of the officers and directors. As shown below, the record here discloses a failure to comply with applicable provisions of law and a gross dereliction of duty by the Bank's officers and directors.

1. *There is no proper corporate purpose under Virginia law for this "freeze out" of minority shareholders.*

At the annual meeting on April 21, 1987, the 85% shareholder proposes to freeze out the Bank's more than 2,000 minority shareholders of record by a merger transaction in which the minority shareholders will be given $42.00 per share, while the majority shareholder will receive stock instead of cash and will consequently be the 100% owner of all the Bank's outstanding stock. Indeed, the proxy statement at page 16 clearly suggests that the purpose of this merger is solely to squeeze out the minority. It recites that the

> principal purpose of the merger is to achieve organizational efficiencies resulting from the Bank's be-

coming a wholly owned subsidiary of Virginia Bankshares. Further, the merger will eliminate the potential for conflicts of interest between minority shareholders of the Bank and Virginia Bankshares and its affiliates.

This is simply a convoluted way of confessing that the merger has no purpose other than eliminating the minority so that the majority can have its own cake and the minority's as well. Moreover, the lack of a proper corporate purpose is apparent from the proxy statement's disclosure at page 18 that "no significant changes in the Bank's business are contemplated if the merger is not consummated."

The proposed merger is precisely the type of "squeeze-out" or "freeze-out" that courts condemn as a manipulative use of a majority's control of a corporation to deprive minority shareholders of corporate income or other advantages to which they would otherwise be entitled. The most recent case is the decision of the Maryland Court of Appeals in *Lerner* v. *Lerner*, 306 Md. 771, 511 A.2d 501 (1986). In that case, Maryland's highest court upheld a preliminary injunction issued on behalf of a minority shareholder who sought to enjoin a merger which apparently had as its sole purpose the freezing out of the shareholder. North Carolina law is similar. *Umstead* v. *Durham Hosiery Mills, Inc.*, 578 F.Supp. 342, 345 (M.D.N.C. 1984) ("plaintiffs' allegation, taken as true, that defendants intended to freeze out the minority shareholders adequately states a breach of fiduciary duty claim"). *See also*, *Lebold* v. *Inland Steel*, 125 F.2d 369, 372 (7th Cir. 1941), *cert. denied*, 320 U.S. 787 (1943) (the court observed that the majority shareholder was simply "griped. . . to see that the minority stockholders were enjoying any profits"); *Gabhart* v. *Gabhart*, 370 N.E.2d 345, 353 (Ind. 1977); *Kirtz* v. *Grossman*, 463 S.W.2d 541 (Mo. App. 1971).

The Bank's proxy statement smugly tells minority shareholders that they have no statutory appraisal remedy as an alternative to the $42.00 price per share dictated by the majority shareholder. The proxy statement fails to disclose either (1) the corollary proposition that shareholders thus retain their common law right to judicial relief, or (2) that, as indicated by the cases cited above, courts of equity will not hesitate to protect a minority shareholder from being frozen out at an inadequate price dictated by the majority.

In view of the evident lack of legitimate corporate purpose and the strong evidence that the sole or primary purpose of the transaction is to freeze out tne minority shareholders, this Commission should not be a party to such a gross breach of fiduciary duty. The merger application should accordingly be denied.

2. *In addition to lack of valid corporate purpose, the evidence shows lack of due care by directors in approving a freeze-out of minority shareholders at a patently insufficient price.*

It is significant that the proxy materials disclose no independent analysis or appraisal of the price to be paid to minority shareholders. Instead, the supposedly independent Board of Directors relied on the expert witness hired by the 85% shareholder under a contingent fee arrangement pursuant to which that investment banker would be reimbursed with a contingent bonus three times the basic fee if the transaction were consummated. Moreover, the so-called "fairness opinion" itself recites that it relied solely upon publicly available information and additional information supplied by the 85% shareholder.

Reliance by the Board of Directors on the financial adviser retained by the majority shareholder in connection with the "fairness" to the minority shareholders is highly irregular on its face, unfair to minority share-

holders and indicative of a callous disregard of the interests of minority shareholders that falls well below the duty of care required of the Board of Directors.

3. *Moreover, the Board of Directors violated its fiduciary duty by accepting a $42.00 price per share that is well below the actual value of the stock.*

Attached as Exhibit B hereto is a preliminary assessment of fair price by Golembe Associates, Inc., a well known, highly respected and independent bank consulting firm well experienced in appraisals. Golembe Associates found, on the basis of its preliminary analysis, that the $42.00 price is substantially below the actual per share value of the Bank, concluding preliminarily that the fair price is 33% to 40% higher, or about $56-$59. Further, the book value of the Bank has increased by approximately 13% per annum over the past two years, so that the merger price of 26% over book value cannot fully reflect the anticipated growth in the net worth of the Bank.

Moreover, while the Bank's earnings increased from $3.67 per share in 1984 to $5.10 per share in 1986, dividends paid by the Bank have not risen since 1984. The practice, given the small trading volume in the Bank's stock, has had the effect of keeping the stock price artificially low—in this case well below its actual value.

The magnitude of the disparity between the independent valuation of a fair price and the one-sided valuation by the majority shareholder's expert is so striking as to establish a *prima facie* case of negligence by the Board of Directors. This breach of the duty of care is aggravated by the apparent haste with which the Board of Directors rushed, at the behest of its 85% majority shareholder, to freeze out the minority shareholders at the price chosen by the majority shareholder.

4. *In addition to the above breaches of fiduciary duty in freezing out the minority for no valid corporate purpose and at an unfair price, the Bank and its majority shareholder appear to have violated federal law respecting disclosure of the transaction.*

The merger was first proposed to the Bank by its majority shareholder sometime in January 1987. An agreement and plan of merger was signed February 12, 1987.

As a public company, the Bank is obliged under Section 13 of the Securities Exchange Act of 1934, as amended, 15 U.S.C. § 78m, and the rules and regulations thereunder, to disclose such extraordinary transactions. We have been unable to locate any filing on Form F-3 by the Bank with the Federal Deposit Insurance Corporation or any press release or other news item disclosing the proposal of the merger or the signing of the merger agreement.

In addition, the controlling shareholder and its parent companies failed to make requisite securities disclosures. Virginia Bankshares and its parent companies filed a statement on Form F-11 on November 20, 1985 stating in pertinent part that it and its parent companies had "no present plans or proposals that relate to or would result in a merger, reorganization, liquidation, sale or transfer of a material amount of assets involving the Bank . . . ." The controlling shareholder and its parent companies did not file a Form F-11 updating this information until March 2, 1987, 18 days after the merger agreement had already been signed. Under Section 13(d) of the Securities Exchange Act of 1934, 15 U.S.C. § 78m(d), and the rules and regulations thereunder, Virginia Bankshares and its parent companies were obliged to make and to "promptly" update filings on Form F-11 disclosing among other things "any plans or proposals which such persons may have to liquidate such issuer, to sell its assets or to merge it . . . ." The Form F-11 filing made more than one month after the merger was

proposed and 18 days after the merger agreement had been executed was not "prompt" as required by law. For example, the Securities and Exchange Commission has established that "[a]ny delay beyond the time the amendment [under Section 13(d)] reasonably could have been filed may not be deemed to be [prompt]." *In the Matter of Cooper Laboratories, Inc.*, Securities Act of 1934, Release No. 22171 (June 26, 1985). The Securities and Exchange Commission indicated in that case that the circumstances required a filing within two business days after occurrence of a material event.

Evidence of activities violating state or federal law is directly relevant to the integrity of management. This has repeatedly been made clear, for example, in decisions by the Board of Governors of the Federal Reserve System. *See, e.g., First State Holding Company, Inc.*, 67 Fed. Res. Bull. 802 (1981) (consumer compliance laws and Treasury Department Regulations); *Savings Bank Shares, Inc.*, 65 Fed. Res. Bull. 767 (1979) (alleged securities law violations); *Benson Bancshares Inc.*, 63 Fed. Res. Bull. 1009 (1977) (concern with *possible* intentional concealment of financial information); *First National Bancshares in Newton, Inc.*, 66 Fed. Res. Bull. 777 (1980) (allegations of unethical treatment of shareholders, if proved, would "warrant or demand" denial of an application).

Summary

For all these reasons the Commission should not approve this merger. Such an outrageous attempt by a majority shareholder to squeeze out minority shareholders, for no valid purpose and at a patently inadequate price, should not be countenanced by the Commission, which is charged to protect the public.

A hearing is requested on this protest.

Respectfully submitted,

HOGAN & HARTSON

[Signatures Omitted in Printing]

DECISION OF STATE CORPORATION COMMISSION

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION
AT RICHMOND, MAY 11, 1987

Case No. BFI870041

APPLICATION OF FAB ACQUISITION BANK

For a certificate of authority to do a banking business in McLean, Fairfax County

and

Case No. BFI870042

FIRST AMERICAN BANK OF VIRGINIA

For a certificate of authority to do a banking business following its merger with FAB Acquisition Bank

---

ORDER GRANTING A CERTIFICATE OF AUTHORITY AND AUTHORIZING A MERGED BANK TO DO BUSINESS

FAB Acquisition Bank and First American Bank of Virginia filed applications simultaneously, pursuant to the Virginia Banking Act (Chapter 2, Title 6.1, Code of Virginia), seeking a banking certificate of authority (§ 6.1-13) and a certificate of authority to do business following the merger of banks (§ 6.1-44). The applications were referred to the Bureau of Financial Institutions, which subsequently submitted a report on the proposed transaction.

The report of the Bureau indicates that Virginia Bankshares, Inc., a Virginia bank holding company in Mc-

Lean, Virginia, currently owns approximately 85% of the voting shares of First American. Together the applications represent legal steps necessary to accomplish a corporate goal: the re-organization is a wholly-owned subsidiary of Virginia Bankshares of First American, which is now a duly-certificated, operating bank and which will be the bank resulting from the merger of the applicants. The boards of directors of Virginia Bankshares and of First American entered into a merger agreement, which has been approved by the shareholders of both companies.

During the course of the Bureau's review of these applications, correspondence was received from counsel representing a group of shareholders who dissented from the merger. Counsel urged us generally, not to approve the application prior to a determination, by the Commission or by a court, that the minority shareholders had been fairly treated in connection with this transaction, *i.e.*, had received a fair price for their shares. Having considered the information and authorities set forth in the several letters submitted by counsel for the dissenters' group and for the Bank, respectively, and having reviewed a memorandum of Commission counsel, we conclude that we lack authority under the laws applicable herein to grant the relief sought, and we therefore decline to address the issues raised by the dissenters or afford them a hearing on the applications before us. We note with approval, concerning the prospect of legal or equitable relief for the dissenting shareholders, that the Circuit Court of Fairfax County has apparently assumed jurisdiction in that matter.

Having considered the applications herein, the associated papers and the report of the Bureau, and it appearing that the directors and shareholders have determined that the bank will derive benefit from becoming a wholly-owned subsidiary of Virginia Bankshares, and it further appearing that benefit to the public's interest may result

therefrom and no detriment to the public will ensue, the Commission is of the opinion and finds that granting the required certificates will be in the public interest. Furthermore, the Commission finds that in the case of these applications: (1) all provisions of law have been complied with; (2) financially responsible individuals have subscribed for capital stock, surplus and a reserve for operation sufficient to warrant successful operation; (3) all directors of the resulting bank have previously taken and filed the oath required by § 6.1-48; (4) the first-named applicant is formed for no other reason than the conduct of a legitimate banking business; (5) the moral fitness, financial responsibility, and business qualifications of those named as officers and directors of the applicants are such as to command the confidence of the community where the bank will be located; (6) deposits of the merged bank will be insured by the Federal Deposit Insurance Corporation.

ACCORDINGLY, IT IS ORDERED that, for purposes of the proposed transaction (not for the purpose of establishing a new operating bank), a banking certificate be granted FAB Acquisition Bank. And, effective upon the issuance by the Clerk of a certificate merging FAB Acquisition Bank into First American Bank of Virginia, the resulting bank shall be authorized to do a banking business at the existing main and branch offices of First American Bank, and the resulting First American Bank hereby is granted a certificate of authority to do such business.

• • • •

A True Copy
Teste:

/s/ George W. Bryant, Jr.
GEORGE W. BRYANT, JR.
Clerk of the
State Corporation Commission

EXCERPT FROM TRANSCRIPT OF ARGUMENT ON DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S INITIAL FEDERAL COMULAINT

[5] THE COURT: (Interposing) Didn't the only named plaintiff vote against it anyway?

MR. CAWLEY: Yes, Your Honor, she did. We are sort of in an ironic—

THE COURT: (Interposing) I wonder what standing she has under Count I. What would disclosure have revealed to her? She voted against it anyway.

[6] MR. CAWLEY: I couldn't agree with you more. Obviously she would be hard put to say she was deceived by a proxy statement when she ended up voting against the very proposal that was put before her and for which material was presented to her for the proxy statement. I think, however, though, that that is not—even though it seems logical to me that that should be a decisive factor, I think that the law though requires that if the proxy statement is part of the transaction and essential to the transaction, a case can be maintained, I say believe it or not even in this situation. So I cannot suggest to Your Honor that because she voted against it that precludes her from bringing this action.

But really what we are saying here is that the reai complaint here is her individual notion that she didn't like $42 a share, and because of that, she asserts that the directors and the majority shareholder did not do their job and did not fulfill their fiduciary responsibilities. That as I say remains in Count II, but what she has attempted to do is to take those notions and to then go back and conjure up a violation of the Securities Act. I sometimes think that the only persons that perhaps read carefully a proxy statement are the attorneys who prepared them in the first instance and then when there is some complaint later on, in this case it's been over a year since this happened, the attorneys who are retained by a disgruntled shareholder, to determine if they [7] can catch the first set of attorneys in the proxy statement. I

am not making light of the importance of a proxy statement. But really what we have here is essentially nitpicking on the part of the plaintiff with respect to the security claim, and in four of the nine counts or nine sections that she is complaining of with respect to the proxy statement and with respect to the other five, they are really just recasting of a view that there has been a breach of the fiduciary responsibility of the directors or the majority shareholders.

So you will find all nine purported violations of the Securities Act under paragraph 27 of the complaint that was filed in this case. As I said, if you look at the first four, they really just don't give rise to the kind of materiality that would be required if there was a mistake or an omission of a material fact. They are not material.

If you look at the second five, they are either not material or they are just another way of saying that there has been a breach of fiduciary duty or they are really incredible nitpicking.

We say in our memorandum and I think it's not too much of hyperbole to say that Miss Sandberg went through, or her attorney went through this proxy statement with a microscope and a tweezers to try to exact certain words and exact certain phrases, and to try to say that there was a misrepresentation.

FEDERAL COURT AMENDED COMPLAINT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Civil Action No.: 88-0299-A

DORIS I. SANDBERG, individually and on behalf of other minority stockholders,

Plaintiff,

v.

VIRGINIA BANKSHARES, INC.,

and

FIRST AMERICAN BANKSHARES, INC.

and

JACK W. BEDDOW [*et al.*]

AMENDED COMPLAINT

(For Damages for Securities Fraud
and Breach of Fiduciary Duties)

Plaintiff brings this action on her own behalf and on behalf of all other former shareholders of First American Bank of Virginia ("First American") (except defendants) to recover damages caused by defendants' issuance of deceptive proxy materials in violation of Section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78a (n), and breach of fiduciary duties in freezing out minority stockholders of First American at a grossly unfair price.

For her Complaint, plaintiff alleges as follows:

Parties

1. Plaintiff Doris I. Sandberg is a citizen of the State of New York who, prior to the matters complained of herein, owned 2,442 shares of the stock of First American.

2. Defendant Virginia Bankshares, Inc. ("Bankshares") is a bank holding company organized under the laws of Virginia, with its principal place of business located in Virginia. Prior to the acts complained of herein, Bankshares owned 85% of the stock of First American and exercised substantial influence over First American. First American's stock was registered under Section 12 the Securities Exchange Act of 1934. All of the stock of Bankshares is ultimately owned by three Middle Eastern investors, Sheik Kamal Adham, Abdullah Darwaish and Faisal Al-Fulaij, who had the power to control Bankshares and its parent, First American Bankshares, Inc., and who may be liable to plaintiff, as controlling persons under the Securities and Exchange Act, or otherwise, for the matters alleged herein. In the event discovery so indicates, plaintiff will promptly move to add them as parties defendant.

3. Defendant First American Bankshares, Inc. ("FABI") is a bank holding company organized under the laws of Virginia, with its principal place of business in Washington, D.C. At all relevant times FABI owned all of the stock of Bankshares and exercised total control over and acted through Bankshares with respect to all matters at issue herein.

4. Defendant Jack W. Beddow is a citizen of Maryland. At the time of the acts complained of herein, defendant Beddow was a director of First American, and a director and officer of Bankshares and FABI.

5. Defendant Harriet F. Bradley is a citizen of North Carolina. At the time of the acts complained of herein, defendant Bradley was a director of First American.

6. Defendants Milton L. Drewer, Jr., E. Guy Ridgely, Emanuel A. Baker, Jr., Joel T. Broyhill, Thomas B. Chamberlin, Thomas P. Chisman, Sidney O. Dewberry, Eric W. Erdossy, George W. Johnson, Charles T. Lindsay, Jr., Donald R. Maxfield, Linda H. Michael, Milton V. Peterson, Glenn W. Saunders, Jr., Charles H. Smith, Jr., Verlin W. Smith, Henry A. Thomas, and Stephen G. Yeonas are citizens of Virginia and, at the time of the acts complained of herein, were directors of First American.

Class Action Allegations

7. The class of former shareholders of First American, excluding defendants, consists of approximately 2,017 shareholders who held, in the aggregate, approximately 15 percent of the issued and outstanding shares of First American prior to the acts complained of herein. Accordingly, the class is so numerous that joinder of all members is impracticable.

8. Questions of both law and fact are common to the class in that the defendants, *inter alia*, sent the same proxy materials to all class members, owed the same duties to all class members, and forced all class members to surrender their shares at the same unfairly low price.

9. For the reasons stated in the preceding paragraph, the claims of plaintiff Sandberg are typical of the claims of all class members.

10. Plaintiff Sandberg will fairly and adequately protect the interests of the class.

11. This action should be maintained as a class action because the questions of law and fact common to the members of the class predominate over any questions that

might arise with respect to individual members of the class, and a class action is superior to other available methods for the fair and efficient adjudication of this controversy.

Jurisdiction and Venue

12. This Court has jurisdiction of this action pursuant to (a) Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa, (b) 28 U.S.C. § 1331, (c) 28 U.S.C. § 1337 and (d) 28 U.S.C. § 1332(a) in that the matter in controversy exceeds the sum or value of $10,000, exclusive of interests and costs.

13. Venue is proper in this District pursuant to 15 U.S.C. § 78aa and 28 U.S.C. § 1391(b).

Allegations Common to All Counts

14. Prior to January 1987, defendants FABI and Bankshares (hereafter collectively "Bankshares") determined that it would be in its economic interest to eliminate the minority shareholders of First American at a low price, and increase its stock ownership of First American from eighty-five percent to one hundred percent, so as to retain all of the earnings of First American for itself and its three ultimate owners, and deny the minority shareholders of First American any share of its earnings.

15. Bankshares believed that it could force the minority stockholders of First American to accept an unfairly low price for their stock because a unique and inexplicable provision of Virginia law denies to stockholders of a bank the usual statutory rights of a stockholder who dissents from a merger to obtain the appraised fair value of his or her stock.

16. In January 1987, defendant Bankshares proposed to eliminate the minority stockholders of First American by means of a freeze-out merger, under the terms of which Bankshares would acquire one hundred percent

ownership of First American, and plaintiff and all other minority shareholders would be required to terminate their stock interest in First American in return for $42.00 in cash per share for their stock.

17. The merger could not be accomplished without the recommendation and approval of First American's Board of Directors.

18. The $42.00 per share price offered by defendant Bankshares for the minority's shares was grossly unfair and far less than the fair value of the shares. A preliminary assessment by the respected bank consulting firm, Golembe Associates, Inc., indicates that the fair price of Plaintiff's shares was approximately 33 percent to 40 percent higher than the $42.00 price offered by defendant Bankshares.

19. Nonetheless, because Bankshares, which sought to obtain plaintiff's stock at the lowest possible price, owned 85% of the stock of First American—and because Virginia provides no statutory dissenters rights to minority stockholders in a bank—plaintiff would be required to accept the grossly unfair price offered by Bankshares unless the defendant directors of First American discharged their fiduciary duties of care and loyalty to the plaintiff minority stockholders and (a) informed themselves as to the fairness of the merger to minority stockholders, (b) protected the rights of the minority stockholders by opposing the merger or requiring a fair price, and (c) disclosed all pertinent information to the minority stockholders.

20. Bankshares had the power to elect all First American's directors and exercised substantial influence over First American's directors, asserting controlling influence through Beddow who was both an officer and director of Bankshares and a director of First American.

21. Bankshares presented its merger proposal shortly before proxy materials for First American's annual meeting were required to be prepared, manipulated the structure and procedure by which First American considered the proposal so as to facilitate its passive acceptance by the First American Board of Directors without any negotiations or informed consideration, and failed to disclose to First American facts pertinent to consideration of the offer, including information indicating that the $42 price was unfairly low and information that the investment advisor on whose advice it encouraged First American to rely had agreed with Bankshares to act solely in its interest and had been promised a 300% premium if it succeeded in inducing First American to accept Bankshares' price.

22. The directors approved Bankshares' proposal and recommended that it be approved by stockholders, (a) without taking any steps to insulate the Board from the substantial influence exercised by Bankshares through Beddow who was infected by a conflict of interest between (i) his interest as an officer and director of Bankshares in forcing out First American's minority at the lowest price possible and (ii) his duty as a director of First American to obtain the highest price possible for the benefit of *all* First American stockholders, (b) without attempting to obtain a higher price, (c) without informing themselves of the pertinent facts, (d) without conducting any independent investigation of the fairness of the price offered the minority by Bankshares, and (e) without obtaining independent professional advice as to their fiduciary duties.

23. Director Beddow approved the merger and influenced the other directors to do likewise because of his conflicting interest in serving the buyer, and the other directors followed the lead of Beddow because of the substantial influence asserted over them by Bankshares, because they were uninformed as to the pertinent facts and the nature of their duties, and because they had self-interested reasons for accepting Bankshares' offer with-

out regard to the fairness of the transaction to public stockholders.

24. In hasty disregard of duty,

(a) the defendant directors failed to retain their own independent financial advisor to assess the fairness of the price being imposed on minority stockholders, and relied on the opinion of the buyer's investment banker that the price offered by the buyer was fair;

(b) the defendant directors, while relying on the fairness opinion obtained by the buyer, closed their eyes to the fact that the buyer provided an incentive for its investment banker to endorse the unfairly low price the buyer wanted to pay by promising to give the investment banker a 300% premium if its fairness opinion was successful in bringing about the transaction at the price desired by the buyer;

(c) at the stockholders' meeting, First American director and President Drewer told stockholders that he did not know why such premium was being paid, and a Bankshares spokesman falsely stated that such arrangement was standard practice because additional work was required if the transaction was successful;

(d) the Executive Committee of the Board of Directors, in recommending approval of the transaction, regarded it as a "tender offer of $42.00 per share", *i.e.*, an offer to *all* stockholders by Bankshares to purchase their stock for $42.00, whereas, in fact, the transaction was a freeze-out merger in which the minority stockholders were *required* to sell their shares for $42.00 and the majority stockholder obtained 100% ownership of the Bank by forcing out the minority; and

(e) on the first occasion the merger was presented, the directors not only approved it, but simultaneously approved proxy materials describing the reasons for their approval.

25. On information and belief, Bankshares, through Beddow and otherwise, participated along with the defendant directors in the preparation and issuance of the Proxy Statement in the Eastern District of Virginia.

COUNT I

(Section 14(a) of the
Securities Exchange Act of 1934)

26. Plaintiff repeats the allegations of paragraphs 1 through 25 as if fully set forth herein.

27. The issuance of proxy materials to minority stockholders was an essential element of the merger.

28. On or about March 25, 1987, each of the defendant directors caused a Notice of Annual Meeting of Shareholders and an accompanying Proxy Statement to be mailed to each First American shareholder, including shareholders in the Eastern District of Virginia.

29. The Proxy Statement contained misstatements of material fact and failed to disclose material facts necessary to make the statements made not misleading in that:

(a) it failed to disclose that the buyer had the voting power to elect all of the directors recommending the transaction and exercised substantial influence and control over the directors;

(b) it falsely stated that the "merger has been approved by the Board of Directors because it provides an opportunity for the Bank's public shareholders to achieve a high value for their shares";

(c) it represented that there were negotiations as to the terms of the merger when, in fact, there were not;

(d) it stated that "an independent investment banking firm" had been retained "to pass on the fairness of the Merger," whereas, in fact, the firm was not independ-

ent at all, and did not "pass on" the fairness of the Merger;

(e) it failed to disclose financial information showing that the value of plaintiff's stock was far greater than represented in the proxy statement, including, *e.g.*, information that management knew that the financial statements understated the value of First American's real estate by $6 per share, a fact later admitted by President Drewer;

(f) it failed to disclose that defendant Beddow was an officer and director of the buyer.

30. Defendants knew of the false and misleading nature, or acted in reckless or negligent disregard of the false and misleading nature, of the statements contained in the Proxy Statement.

31. Defendants failed to correct their spokesman's misrepresentations concerning the buyer's fairness opinion and the compensation arrangement with the buyer's investment banker.

32. The merger proposal was approved at First American's Annual Meeting in the Eastern District of Virginia on or about April 21, 1987.

33. As a result of defendants' conduct, plaintiff has been required to terminate her stock interest in First American against her will, and to accept a grossly inadequate price for her shares.

34. Defendants' disregard of plaintiff's rights was motivated, in part, by their erroneous belief that the failure of Virginia statutory law to provide dissenters' rights to minority stockholders in a Virginia bank could be used to deny plaintiff any judicial remedy. Although the Circuit Court for Fairfax County, Virginia (No. 101443; appeal pending) has held that minority stockholders in a Virginia bank have no equitable appraisal rights, stockholders have rights and remedies under the Securities Exchange Act of 1934 and for breach of fiduciary duty.

35. Defendant's conduct respecting the Proxy Statement violated Section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(a), and Federal Deposit Insurance Corporation Regulation § 355-206 promulgated thereunder, 12 C.F.R. § 355-206, as a result of which plaintiff and all other minority shareholders have been injured.

COUNT II

(Breach of Fiduciary Duty)

36. Plaintiff repeats the allegations of paragraphs 1 through 35 as if fully set forth herein.

37. Defendant Bankshares, as the holder of 85 percent of the stock of First American and because of its representation on First American's Board, owed fiduciary duties to the plaintiff and all other minority shareholders in connection with the freeze-out merger, including the duties to deal fairly and candidly with First American minority stockholders and their representatives, and the duty to pay a fair price for the minority's shares. Defendant Bankshares breached these duties by dealing unfairly with First American as to the timing and structure of the merger, by failing to disclose material information with respect to the merger and the fairness of the price while participating in First American's deliberations through its representative director, and by forcing plaintiff and all other minority shareholders to terminate their stockholder interests in First American at an unfair price.

38. The defendant directors owed fiduciary duties to the plaintiff and all other minority shareholders to act fairly, candidly and carefully with respect to efforts by the 85 percent shareholder, Bankshares, to freeze out the minority shareholders. In particular, the defendant directors were obligated to negotiate merger terms that

provided the highest price per share for minority stockholders, to make an informed, independent judgment, in good faith, that the merger terms, including the price, were fair to *all* First American stockholders, and to disclose with entire candor all material facts concerning the merger to minority stockholders so that the minority would be able to make an informed decision as to whether to accept the merger price, or seek judicial remedies.

39. The defendant directors breached their fiduciary duties to plaintiff and all other minority shareholders by negligently approving and recommending the proposed merger without taking the steps necessary to make an informed, deliberate judgment in good faith as to the fairness of the merger terms. They approved the $42.00 merger price proposed by Bankshares in passive reliance on the investment advisor retained by the buyer, without conducting an independent investigation of the adequacy of the merger terms, without retaining an independent advisor to advise the Board of Directors as to the value of the minority's stock and the fairness of the proposed merger terms, or otherwise informing themselves of the pertinent facts, and without negotiating with Bankshares or others to improve the merger terms.

40. Defendant Beddow breached his fiduciary duty of loyalty to the minority stockholders of First American by voting to approve the merger, and by assisting in obtaining the approval of his fellow directors, despite the clear conflict of interest between (i) his interest as an officer and director of Bankshares in forcing out First American's minority at the lowest price possible and (ii) his duty as a director of First American to obtain the highest price possible for the benefit of *all* First American stockholders.

41. All of the defendants breached their fiduciary duties to plaintiff and all other minority shareholders through the defendants' manipulation of the value of First American and unfair appropriation of earnings.

42. Plaintiff and all other minority shareholders of First American were injured as a result of each of the defendants' breaches of fiduciary duty.

43. The character of defendants' disregard of their duties to minority stockholder was such that it ought to be punished and deterred by the award of punitive damages.

PRAYER FOR RELIEF

WHEREFORE Plaintiff prays for judgment against the defendants for:

1. Damages, including compensatory damages in the amount of the difference between $42.00 per share and the true value of the minority stock interest in First American together with interest thereon from the date of the merger, April 21, 1987;

2. Punitive damages in an amount determined after trial to be sufficient to punish defendants for their misconduct and to deter such misconduct by others;

3. Plaintiff's costs of this action, including reasonable attorneys' fees; and

4. Such further relief as the Court deems appropriate.

JURY DEMAND

Plaintiff hereby demands a trial by jury on her complaint as to all issues so triable.

HOGAN & HARTSON

[Signatures Omitted in Printing]

EXCERPT FROM DEPOSITION OF DORIS I. SANDBERG, JUNE 21, 1988

* * * *

[16] I bought this with the idea that I could keep it as long as I wanted it, and they are taking it away from me. And as I said, I don't know what you call it in the corporate world, but if you put this out, say, in the schoolyard, if you see some great big high school kid taking away a kindergartner's lunch and saying I'll give you a nickel for it, you would call it bullying. And I felt that they were bullying.

Now we get down to the practical things. The stock was worth I believe $33 a share the first of January, which made my share worth something like between $81,000 and $82,000. They offered me $42 a share, which came to $102,000.

Now, my tax, and the tax changed in 1987, which really hurt, my Federal tax bill was 28 percent, and in New York State my state tax bill was eight percent. And over these years I had a 90 percent capital gain.

My tax on this $102,000 was $30,500, which [17] right away took me down to $72,000. I've lost $9,000. Now that is something I was upset about.

Q. You mean if it had been done in 1986 you would have saved money?

A. I would have saved money. I would have come out, I believe, just about even. But I'm not sure.

So the timing was something that was bothering me. And then my last practical point is that no matter what they are giving me, they are shutting me out of a very profitable investment.

They showed in their proxy statement or their annual report that the stock has been appreciating at the rate of 15, 16 percent over the last three years. And taken the money that they have given me for my stock, there is no place that I can get a safe secure investment for much more than 9 percent.

And at my point in life I cannot afford to speculate. I am retired, I'm living on Social Security, pension, and my income from investments, so that in effect this money is going to be earning me only one half, just about one half of what it was. And this was my hedge against inflation.

[18] Q. Those were your emotional and practical reactions to what we'll call the merger transaction?

A. That's right.

* * * *

EXCERPTS FROM DEPOSITION OF PAUL H. WEINSTEIN, JUNE 28, 1988

* * * *

[16] Q. Who else spoke at that meeting in opposition to the transaction?

A. Gary Plushnick, my son, Jay, and I think I did. I asked some questions. I am not sure I expressed any opinion.

Q. Can you recall first what you stated either in the form of a question or in the form of a statement?

A. No. I would be guessing if I told you something. I just don't recall specifically what I [17] asked him.

Q. Do you recall what Gary Plushnick said?

A. Yes. Generally.

Q. All right.

A. He was primarily questioning Mr. Drewer about the value of the real estate. I think he questioned him about the fact that the Board of Directors did not get an independent appraisal, that they accepted without question the letter from Keefe, Bruyette, the fact that the true book value should have been reflected as of March the 31st, 1987 when everything I believe in the proxy statement was reflected as of December 31st, '86 and that the fact that the bank did not get the real estate appraised to determine the fair market value of the real estate.

Q. Do you recall what Mr. Drewer responded to or how he responded to each of these points?

A. Something to the effect that the bank knew what the value or the Board of Directors knew what the value of the real estate was. I don't thing he really answered the other questions.

Q. With respect to the independent appraisal?

[18] A. Right, and the fee arrangement. I am sure Mr. Plushnick discussed the fee arrangement that Keefe, Bruyette had with the holding company.

Q. What did Mr. Drewer say about that, if anything?

A. I have no recollection as to what he answered.

Q. What about the book value as of March 31st?

A. I don't thing he answered that either.

Q. Did Mr. Plushnick say anything else that you can recall?

A. I am sure he said something. I just don't recall. As I recollect, it was more of like a question-and-answer thing. He was directing questions to Mr. Drewer, and Mr. Drewer was attempting to answer his question.

Q. Did Mr. Plushnick say that he was dissatisfied with the price of $42?

A. I think it was apparent that he was dissatisfied because of the fact that there had been bank mergers in the area where they were paying two, two and a half times book value, and I think that is his business. I assume he knows what the value of the stock was.

* * * *

[38] Q. Did you read the proxy statement, sir?

A. Yes.

Q. When you received it?

A. Yes.

Q. Did you review it with anybody or did you read it privately?

A. You mean when I first got it? I am sure I read it myself.

Q. Did you thereafter go over it with anybody?

A. I discussed it with my son at the time. Well, did I? I did eventually. I don't know when I discussed it with my son, Jay, I should differentiate.

Q. As I recall, Jay had an occupation that [39] perhaps—

A. My son was in his last year at Wharton Business School at the time this took place.

Q. He has a background in finance, I take it, or business administration of some type?

A. Yes, he has his MBA.

Q. What do you recall discussing with your son?

A. I think we just went over the proxy statement, and of course I think the same things disturbed him as disturbed me.

Q. What were those things?

A. That the Board of Directors of First American Bank did not get an independent appraisal of the stock.

Q. Excuse me, was that apparent to you after reading the proxy statement?

A. Sure. That Keefe, Bruyette was retained by the holding company. They were not independent.

Q. Excuse me. What do you mean they weren't independent?

A. They were operating at the direction of the holding company. The holding company retained Keefe, Bruyette and they were paying them.

[40] Q. Okay. So that was obvious from the proxy statement?

A. Sure. It was also obvious from the proxy statement it was highly unusual to me that this appraisal of Keefe, Bruyette would be on a contingency basis, why? This is things that came into my mind. Why would an opinion letter as to value be contingent or the fee be based on a contingency?

Q. Did you check and see whether that was traditional in the investment banking world?

A. No, I did not. The Keefe, Bruyette letter makes it quite clear that they did not verify a lot of the information that they received from the holding company. It is kind of fuzzy as to whether or not they ever got any information from First American Bank. I guess I have to differentiate, First American Bank of Virginia.

Q. If you want to, you can refer to the holding company and the Virginia Bank, if that would be easier.

A. Okay. It is obvious from their letter that they never inquired about the fair market value of the real estate. Let's see what else.

[41] I think the most disturbing thing was the overall acceptance by the board of First American Bank of Virginia that they would be dictated to as to the price by the buyer, knowing full well that they had a fiduciary

duty to the minority stockholders to at least, the very least, get their own independent appraisal of the stock.

Q. Why do you think they were required to do that?

A. Well, I guess the only analogy that I can draw for you is that if I were going to buy a house and you were selling a house and I said to you, Mr. Cawley, your house is worth X and, therefore, that is what you are going to sell it to me for, I think that at the very least they had a fiduciary, they have a fiduciary duty, and at the very least they had an obligation to go and get their own independent appraisal.

This was not an independent appraisal. This was a dictate by the holding company: You are going to take $42 a share. There was no negotiation, nothing.

And there are some, I don't want to use omissions, from the proxy statement. The price of $42 a [42] share, they say, is 30 percent higher than $32.50, at which the bank stock traded on February the 8th.

Well, that $32.50 maybe that was correct as of February 8th but it didn't include the fair market value of the real estate which Mr. Drewer admitted at the annual meeting was worth at least $7 a share.

So the 30 percent is inaccurate, not even close, and, of course, they make no allowance for the increase in the book value from the 1st of January to the 31st of March.

Q. What was that increase?

A. Book value, I can't answer that. I think Mr. Drewer said about a buck and a half.

Q. Is there anything else that caught your eye as you went through the proxy statement?

A. I mentioned the fee arrangement between the holding company and Keefe, Bruyette. Keefe, Bruyette did not verify any of the information that was given to them and it is somewhat misleading in that it appears that the information with respect to the value of First American Bank—not the holding company—was given to him by the holding company and not by the bank.

[43] Q. Do you have any indication that any information given to Keefe, Bruyette by the holding company with respect to the Virginia Bank was inaccurate?

A. I can't answer that. I don't know. I don't think they told them the true value of the real estate. I think that is pretty obvious.

• • • •

[56] Q. What evidence do you have that they did accept the price without question, as you put it?

A. That is exactly what happened. That is exactly what Mr. Drewer said at the annual meeting. They felt it was a fair price so they took it.

Q. That is not the same thing as saying they accepted it without questioning it.

A. What did they question?

Q. I don't know. Are you saying Mr. Drewer stood up and said: We accepted this price without question?

A. I think there was a meeting. Nobody ever mentioned the fact that the value of the real estate, nobody ever mentioned that to Keefe, Bruyette, and I think that is probably one of the most significant items.

You have got the signatures of all these directors on here. Let me say this to you. Mr. Beddow is wearing two hats. okay?

Q. Can you tell that by looking at the proxy statement?

A. Sure you can, sure you can.

[57] Q. How do you tell that?

A. Because it says it in here that he is a director, executive vice president, secretary, First American Bankshares, Inc., director, First American Bankshares, Inc. and First American Bank of Maryland.

He is wearing actually three hats. He shouldn't have participated in any of the negotiations and he signed the agreement to merge.

Q. How did he sign it?

A. He signed it Jack Beddow, Jack W. Beddow.

Q. Is there a title for him there?

A. It says First American Bank of Virginia by the chairman of the board and it says by majority of the Board of Directors of the Bank of Virginia and his signature is there under Mr. Drewer's.

Q. Did he sign it at the top too?

A. He sure did.

Q. How did he sign it there?

A. Jack W. Beddow, president of Virginia Bankshares, Inc.

Q. And you were aware of that when you looked at the proxy statement?

[58] MR. HASSETT: Aware of what?

BY MR. CAWLEY:

Q. Mr. Beddow's various roles.

A. When I read it or when I studied it. I can't pinpoint a time when I discovered that.

Q. It is certainly clear?

A. It was certainly clear.

Q. You agree with me it is clear how his different roles—if you look at the proxy statement?

A. I didn't say his roles were different. I said he should not have participated. He participated with Virginia Bankshares as president and then he has a conflict of interest in signing as a director.

Whose hat is he wearing here?

Q. I understand. The fact that he was wearing various hats is clearly set out there in the proxy statement, is it not?

A. If you look at this, you don't look for it, you are not going to probably notice it.

Q. You didn't have any trouble finding it?

A. No, not after I studied it and looked at it.

Q. What evidence do you have that the directors [59] were making their decision based on some other reason, for instance, their own interest?

A. It would all be conjecture.

• • • •

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

Civil Action No. 88-299-A

DORIS I. SANDBERG,
Plaintiff,

v.

VIRGINIA BANKSHARES, INC., *et al.*,
Defendants.

AMENDED ANSWER

COMES NOW Emanuel A. Baker, Jr., Jack W. Beddow, Harriet F. Bradley, Joel T. Broyhill, Thomas B. Chamberlin, Thomas P. Chisman, Sidney O. Dewberry, Milton L. Drewer, Jr., Eric W. Erdossy, George W. Johnson, Charles T. Lindsay, Jr., Donald R. Maxfield, Linda H. Michael, Milton V. Peterson, E. Guy Ridgely, Glenn W. Saunders, Jr., Charles H. Smith, Jr., Verlin W. Smith, Henry A. Thomas and Stephen G. Yeonas ("Director Defendants"), by counsel, and for their Amended Answer to the Amended Complaint of Doris I. Sandberg, respectfully allege as follows:

FIRST DEFENSE

Director Defendants aver that the Amended Complaint fails to state a claim or right or cause of action against them upon which relief can be granted.

SECOND DEFENSE

And now, particularly answering the allegations of the plaintiff's Amended Complaint:

1. Lacking sufficient information either to admit or deny fully the allegations of paragraph 1 of the Amended Complaint, Director Defendants neither admit nor deny the allegations of paragraph 1 of the Amended Complaint.

2. Director Defendants admit that co-defendant Virginia Bankshares, Inc. ("Virginia Bankshares") is a bank holding company organized under the laws of Virginia, with its principal place of business located in Virginia, that before the transaction described in the Amended Complaint Virginia Bankshares owned eighty-five percent (85%) of the stock of First American Bank of Virginia ("First American") and that the stock of First American was registered under Section 12 of the Securities Exchange Act of 1934. Except as stated, Director Defendants deny each and every allegation of paragraph 2 of the Amended Complaint.

3. Director Defendants admit that co-defendant First American Bankshares, Inc. ("FABI") is a bank holding company organized under the laws of Virginia, with its principal place of business located in Washington, D.C., which owns all of the stock of Virginia Bankshares. Except as stated, Director Defendants deny each and every allegation of paragraph 3 of the Amended Complaint.

4. Director Defendants admit the allegations of paragraphs 4, 5 and 6 of the Amended Complaint.

5. To the extent paragraphs 7 and 8 of the Amended Complaint constitute a statement of law, neither requires an answer. To the extent either contains statements of fact, Director Defendants deny each and every such allegation of paragraphs 7 or 8 of the Amended Complaint.

6. Director Defendants deny each and every allegation of paragraphs 9 and 10 of the Amended Complaint.

7. Paragraphs 11, 12 and 13 of the Amended Complaint contain statements of law which require no response. To the extent any such paragraph contains an allegation of fact, it is denied.

8. The statutory law of Virginia withholds from a stockholder dissenting from a proposed merger a right to secure a court-ordered price for his or her shares in lieu of the agreed price therefor. Except as stated, Director Defendants, lacking information as to the thoughts or intentions of Virginia Bankshares, deny each and every allegation of paragraphs 14 and 15 of the Amended Complaint.

9. In January 1987, Virginia Bankshares proposed to First American and its Board of Directors a merger with an entity wholly-owned by Virginia Bankshares pursuant to which shareholders of First American other than Virginia Bankshares would receive $42.00 per share for each share of stock held by such owner. Except as stated, Director Defendants deny each and every allegation of paragraph 16 of the Amended Complaint.

10. Director Defendants admit the allegations of paragraph 17 of the Amended Complaint.

11. Director Defendants have been shown a letter to certain shareholders of First American in which Golembe Associates, Inc. predicted that it might assign a price of more than $42.00 per share for the shares of stock of the bank if Golembe Associates, Inc. had certain information the letter says Golembe Associates, Inc. did not have. Except as stated, Director Defendants deny each and every allegation of paragraph 18 of the Amended Complaint.

12. Director Defendants in the exercise of their collective and individual good faith business judgment and relying upon information, opinions, reports and statements supplied to the Board of Directors and to its executive committee by officers of the corporation and by others, including Keefe, Bruyette & Woods, Inc., determined to approve the merger agreement proposed by Virginia Bankshares and to recommend its approval to the shareholders of First American. Those Director Defend-

ants not serving on or with the Executive Committee of the Board of Directors in its consideration of the transaction also relied upon the report of that committee in making the described decisions. Thereafter, on or about March 25, 1987 First American prepared proxy material (the "Proxy Material") to be sent to all shareholders of the bank in which the proposed merger transaction was fully described and which disclosed all pertinent information to the shareholders. Reference is made to the Proxy Material for a full description of the merger transaction, the terms of which description are incorporated herein by this reference. Except as stated, Director Defendants deny each and every allegation of paragraph 19 of the Amended Complaint.

13. Over time Virginia Bankshares as 85% shareholder of First American might have voted its shares to replace members of First American's Board of Directors. It had never removed or replaced any director, except that directors reaching the retirement age were not reelected after attainment of such age. Jack Beddow was and is an officer and director of Virginia Bankshares and a director of First American. Except as stated, Director Defendants deny each and every allegation of paragraph 20 of the Amended Complaint.

14. The Director Defendants deny each and every allegation of paragraph 21 of the Amended Complaint.

15. Director Defendants state that First American entered into a merger agreement conditioned on shareholder approval and that the proposed merger was submitted to and approved by the shareholders. The proposed merger transaction was reviewed by the Executive Committee of the Board of Directors of the bank which examined the report of Keefe, Bruyette & Woods (the "Fairness Opinion"); discussed the Fairness Opinion with the investment bankers who prepared it; and determined amongst themselves that the proposed price, a substantial premium over both market and book values of

the stock, was fair. The Executive Committee so reported to the Board of Directors which, without dissent and after careful consideration, recommended the proposed transaction to the shareholders. At the shareholder meeting on April 21, 1987, the shareholders voted 97.3% in favor of the transaction with 2.7% opposing the proposed merger; the minority shareholders voted to approve by a margin of 72.3% in favor to 27.7% against. Except as stated, Director Defendants deny each and every allegation of paragraph 22 of the Amended Complaint.

16. Director Defendants deny each and every allegation of paragraphs 23, 24 and 25 of the Amended Complaint.

17. Responding to paragraph 26 of the Amended Complaint, Director Defendants adopt their responses to paragraphs 1-25 respectively of the Amended Complaint.

18. Responding to paragraph 27 of the Amended Complaint, Director Defendants state that shareholder approval was an essential element of approval of the challenged transaction and that the shareholders were entitled to and did receive complete, accurate proxy materials prior to the meeting to consider the merger.

19. Director Defendants state that on March 25, 1987, First American sent the Proxy Material and Notice of Annual Meeting of Shareholders by mail from the Eastern District of Virginia to each shareholder of First American. Except as stated, Director Defendants deny each and every allegation of paragraph 28 of the Amended Complaint.

20. Director Defendants deny that the Proxy Statement contained misstatements of material facts or failed to disclose material facts necessary to make any statement made not misleading. Specifically, Director Defendants state:

A. The steps preceding the merger described in the Amended Complaint and the decision of Director

Defendants to recommend the merger and enter into a merger agreement, subject to shareholder approval, were duly described in the Proxy Material sent to all shareholders. All material facts were disclosed and properly stated in the Proxy Material; and all other legal requirements were met.

B. The transaction described in the Amended Complaint was proposed and carried out at a fair price.

Except as stated, Director Defendants deny each and every allegation of paragraph 29 of the Amended Complaint.

21. Director Defendants state that paragraph 30 of the Amended Complaint contains statements of law, requiring no response. To the extent there are statements of fact in paragraph 30, Director Defendants deny each and every such statement of fact.

22. Director Defendants deny each and every allegation of paragraph 31 of the Amended Complaint.

23. Director Defendants admit the allegations of paragraph 32 of the Amended Complaint.

24. As a result of the merger, plaintiff received a price of $42.00 per share for her shares; this payment was a fair price, being a substantial premium over both market and book value of the shares and was proposed and provided in accordance with Virginia law. Execpt as stated, Director Defendants deny each and every allegation of paragraph 33 of the Amended Complaint.

25. In *Weinstein v. First American Bank of Virginia*, Chancery No. 101443 (appeal pending), the Circuit Court for Fairfax County held that the minority shareholders of First American had no equitable appraisal rights. Except as stated, Director Defendants deny each and every allegation of paragraph 34 of the Amended Complaint.

To the extent paragraph 34 of the Amended Complaint contains statements of law, no response is required.

26. Director Defendants deny each and every allegation of paragraph 35 of the Amended Complaint.

27. Responding to paragraph 36 of the Amended Complaint, Director Defendants adopt their responses to paragraphs 1-35 respectively of the Amended Complaint.

28. To the extent paragraph 37 of the Amended Complaint contains statements of law, they require no response. To the extent paragraph 37 of the Amended Complaint contains statements of fact, Director Defendants deny each and every allegation of paragraph 37 of the Amended Complaint.

29. Director Defendants in all activities material hereto discharged their duties as directors in reviewing and approving the proposed merger in accordance with their good faith business judgment of the best interests of the corporation and are not liable therefor to plaintiff. Except as stated, Director Defendants deny each and every allegation of paragraph 38 of the Amended Complaint.

30. In approving and recomending the proposed merger, the Director Defendants acted in accordance with their good faith business judgment of the best interests of the corporation and relied in good faith on officers and employees of the bank, and other advisors and consultants to the bank whom the Director Defendants believed, in good faith, to be reliable and competent. Except as stated, Director Defendants deny each and every allegation of paragraph 39 of the Amended Complaint.

31. To the extent paragraph 40 of the Amended Complaint contains statements of law, they require no response. To the extent there are statements of fact in paragraph 40, Director Defendants deny each such statement of fact.

32. Director Defendants deny each and every allegation of paragraphs 41, 42 and 43 of the Amended Complaint.

THIRD DEFENSE

Director Defendants are not liable under Virginia Code § 13.1-690 for their actions in reviewing and approving the merger and with respect to the issuance of the Proxy Materials. These actions were rendered in accordance with the Director Defendants' good faith business judgment of the best interests of the corporation and in good faith reliance on bank officers and employees, the Executive Committee of the Board of Directors, and other outside advisors and consultants whom Director Defendants believed in good faith were reliable and acting within their professional competence.

FOURTH DEFENSE

The Virginia doctrines of collateral estoppel and claim or issue preclusion prevent plaintiff from pursuing this action because these issues could have been raised, but were not, in that action entitled *Weinstein, et al. v. First American Bank of Virginia, et al.*, Chancery No. 101443 (appeal pending), in the Circuit Court of Fairfax County.

FIFTH DEFENSE

This court should stay exercise of the jurisdiction here sought to be invoked to await and apply the law of Virginia as it will be determined by disposition of the appeal now pending in *Weinstein, et al. v. First American Bank of Virginia, et al.*, certain principles of which may be controlling in disposition of aspects of this case.

SIXTH DEFENSE

Should Director Defendants be found liable to plaintiff, which is denied, Virginia Code § 13.1-692.1 provides plaintiff's sole remedy and limits her recovery to the

greater of (a) $100,000.00 or (b) the amount of cash compensation received by each Director Defendant from First American during the twelve months immediately preceding the acts or omissions for which plaintiff seeks to impose liability.

SEVENTH DEFENSE

All actions of the Director Defendants which are challenged herein occured more than one year prior to the initiation of this suit and, therefore, are barred by the applicable statutes of limitations, including but not limited to Virginia Code § 8.01-248.

WHEREFORE, Director Defendants pray that this, their Answer, be deemed good and sufficient and that after due proceedings had, there be a judgment in their favor and against plaintiff, dismissing the Amended Complaint at plaintiff's cost, and for all general and equitable relief.

[List of Defendants and Signature of Counsel Omitted in Printing]

[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

[Caption Omitted in Printing]

DEFENDANT VIRGINIA BANKSHARES, INC.'S ANSWERS TO PLAINTIFF'S FIRST SET OF INTERROGATORIES

The defendant, Virginia Bankshares, Inc. ("Virginia Bankshares"), pursuant to Fed. R. Civ. P. 33(a), answers the First Set of Interrogatories propounded to it by the plaintiff, Doris I. Sandberg ("Sandberg"), as follows:

ANSWERS TO INTERROGATORIES

1. Please provide all of the data and information, attaching documents to the extent necessary, that you believe is necessary as the basis for an assessment of the value of the common stock of First American Bank of Virginia held by minority shareholders as of the date of the merger referred to in the complaint herein.

OBJECTION:

Please refer to the objection to this interrogatory served upon Sandberg on May 25, 1988.

2. Please state each fact of which you are aware which shows that the Directors of First American Bank of Virginia attempted to obtain higher price than that offered in the merger proposal of Virginia Bankshares, Inc.

OBJECTION:

Please refer to the objection in this interrogatory served upon Sandberg on May 25, 1988.

3. Please state each fact of which you are aware which shows that the Directors of First American Bank of Vir-

ginia informed themselves of all facts pertinent to the merger.

OBJECTION:

Please refer to the objection to this interrogatory served upon Sandberg on May 25, 1988.

4. Please state each fact of which you are aware which indicates that the Directors of First American Bank of Virginia conducted an independent investigation of the fairness of the price offered by Virginia Bankshares.

OBJECTION:

Please refer to the objection to this interrogatory served upon Sandberg on May 25, 1988.

5. Please state each fact of which you are aware which shows that the Directors of First American Bank of Virginia obtained independent professional advice as to their fiduciary duties.

ANSWER:

In connection with reaching its decision to make an offer to purchase the shares of the minority stockholders, Virginia Bankshares relied upon the opinion rendered by the independent investment banking firm of Keefe, Bruyette & Woods, Inc. ("KBW") as to what would be a fair offering price per share. KBW is one of the finest and most well-respected investment banking firms in the United States, and a firm with particular expertise and experience in the banking industry. It is Virginia Bankshares' understanding that, once KBW had independently determined what would be a fair price, and once Virginia Bankshares made the decision to offer that independently-determined price to the minority shareholders, the proposal was presented to the Board of Directors of First American Bank of Virginia. The Board of Directors' executive committee then held a meeting with representatives of KBW and questioned those representatives in detail as to the bases for their independent opinion and

advice that $42-per-share represented a generous price for the minority shareholders' stock. It is also Virginia Bankshares' understanding that both the Board of Directors of First American Bank of Virginia and its executive committee were satisfied that KBW's independent opinion as to the price was fair and, indeed, generous.

6. Please state the name, address and telephone number of each person who, to your knowledge, participated in the preparation and issuance of the proxy statement referred to in the complaint herein, and describe the pertinent conduct of each such person and state the date on which such conduct occurred.

ANSWER:

Subject to the objection previously filed, Virginia Bankshares believes that the general counsel to the First American Bank of Virginia participated in the preparation and issuance of the proxy statement, but Virginia Bankshares does not know what conduct she engaged in. First American Bank of Virginia's general counsel is Janis Orfe, and she may be reached at the offices of First American Bank of Virginia. Ms. Orfe may have consulted with outside counsel, but Virginia Bankshares does not know the names of the lawyers who may have been consulted.

7. Please state each fact on which you base the contention in paragraph 5 of your Answer that class certification is not appropriate in this case.

ANSWER:

Virginia Bankshares is presently unable to answer this interrogatory because Sandberg and her lawyers have refused to provide Virginia Bankshares with the information necessary to test her adequacy as a putative class representative. Sandberg and her lawyers have also refused to provide information necessary to allow Virginia Bankshares to acquire the data necessary fully to answer the remainder of this question.

Subject to this qualification, Virginia Bankshares states that class certification is not appropriate in this action because Sandberg voted against the merger and, therefore, cannot have in any way relied upon, or have been damaged by the federal securities laws defects she purports to discern in the proxy statement.

Furthermore, Sandberg's lawyers cannot adequately represent the interests of the putative class of former minority shareholders of First American Bank of Virginia because they have a conflict of interest with, and have dismissed from the action, two of their clients, Dwight C. Schar and Thomas G. Mays. Mr. Schar and Mr. Mays are on the Board of Directors of First American Bank of Virginia, and there is no legitimate reason to dismiss them as defendants to this action, other than the conflict of interest on the part of Sandberg's lawyers, Hogan & Hartson.

8. With respect to the allegation in the Third Affirmative Defense of your Answer, please state the name and address of each person who has communicated to you the reasons for the merger, the date of such communication, the persons making and receiving it, and the substance thereof.

OBJECTION:

Please refer to the objection to this interrogatory served upon Sandberg on May 25, 1988.

VIRGINIA BANKSHARES, INC.

By: /s/ Jack W. Beddow
JACK W. BEDDOW
President

[Notarization and Certificate of
Service Omitted in Printing]

EXCERPT FROM BRIEF IN SUPPORT OF DEFENDANTS VIRGINIA BANKSHARES, INC.'S AND FIRST AMERICAN BANKSHARES, INC.'S MOTION FOR SUMMARY JUDGMENT

• • • •

[47] 3. *The Uncontradicted Facts Show That Sandberg In No Way Relied Upon Anything Contained In The Proxy Statement For Her Decision To Vote Against The Merger.*

Sandberg alleges that the Proxy Statement violated the disclosure requirements of the federal securities laws. Even if this were true, those disclosure defects assumed no significance in her decision to vote against the merger. When asked if she decided to vote against the merger after reading the Proxy Statement, she declared "absolutely. . . . My decision was based on the fact that they were doing something to me that I didn't want. . . . And maybe I couldn't stop it, but I certainly wasn't going to help them do it" (Sandberg deposition at p. 38).

The facts that Sandberg now alleges were omitted, or misstated, assumed no significance in her deliberations. She testified that for emotional and purely personal tax reasons she decided to vote against the merger immediately after reading the Proxy Statement (Sandberg deposition at pp. 15-17, 38). There was no "substantial likelihood", indeed no likelihood at all, that [48] the kinds of things Sandberg says were not revealed, or improperly revealed, in the Proxy Statement would have in any way altered the "total mix" of information made available to her. Certainly, these alleged omissions or misrepresentations assumed no actual significance in her deliberations because she had made up her mind to vote against the merger after she read the Proxy Statement. Sandberg, therefore, has failed to satisfy the threshold requirement of *TSC Industries* that the assertedly omitted or misrepresented information must be "material" to her deliberations. *See Kademian*, 792 F.2d at 623 n.7

(plaintiff unable to prove reliance when he voted against merger and admitted in his deposition that the Proxy Statement did not deceive him).

Similarly, Sandberg cannot prove either predicate to the rule of presumptive causation declared in *Mills*. First, she cannot prove the "materiality" requirement, and second, she cannot prove that the proxy solicitation itself was "an essential link" in the accomplishment of the merger transaction.

The Proxy Statement itself frankly revealed that the Board of Directors fully expected shareholder ratification of the merger because Virginia Bankshares owned 85% of First American's stock, because it had indicated its intention of voting for the merger, and because only a 66⅔% vote was necessary under Virginia law to effectuate the merger (*see* FABI's and Virginia Bankshares' pretrial list of exhibits, Exhibit No. 10 at p. 2).

[49] FABI and Virginia Bankshares owned more than sufficient shares to assure ratification of the merger, without putting the matter to the minority stockholders. The proxy solicitation, therefore, was not an "essential link in the *accomplishment* of the transaction".

Mills left open an issue presented in this case. The Supreme Court in that case was careful to point out that it "did not decide whether causation could be shown where the management controls a sufficient number of shares to approve the transaction without any votes from the minority." 396 U.S. at 385 n.7.

Courts interpreting this cryptic statement have reached inconsistent results. The Second Circuit has ruled that *Mills* causation can be present even if the minority shareholders' vote is totally unnecessary to approval of the transaction. *Schlick v. Penn Dixie Corp.*, 507 F.2d 374, 382-83 (2d. Cir.), *cert. denied*, 421 U.S. 976 (1975). Other courts have ben unprepared to go this far because "[a] strict liability rule would impose liability for fully innocent misstatements. It is too blunt a tool to ferret out the kind of deceptive practices Congress sought to prevent

in enacting Section 14(a)." *Shidler v. All-American Life and Financial Corp.*, 775 F.2d 917, 927 (8th Cir. 1985).

Where minority votes are "essential" to the transaction, this court has had little difficulty in finding *Mills* causation. *Herschfang v. Knotter*, 562 F. Supp. 393, 398 (E.D. Va. 1983), [50] *aff'd*, 725 F.2d 675 (4th Cir. 1984) ("In the instant case, there can be no doubt that the transaction required shareholder approval . . ."). This court has never, however, subscribed to the anomalous position apparently endorsed by *Schlick* that causation is found even though the plaintiff did not rely upon anything in the Proxy Statement in deciding to vote against a proposed transaction. Such a rule makes no sense, and it particularly makes no sense in this case.

• • • •

EXCERPTS FROM CORPORATE DEFENDANTS' PROPOSED JURY INSTRUCTIONS

DEFENDANTS' PROPOSED JURY CHARGE NO. —

Plaintiff has the burden of proof in this case. That is, she must establish by a preponderance of the evidence each necessary element of the two causes of action she has alleged against Defendants.

In Count I of this case, Plaintiff has alleged that the Defendants made misrepresentations and omitted to state material facts in the proxy materials circulated to her and the other shareholders of First American Bank of Virginia in preparation for the meeting of shareholders at which the merger transaction was considered and approved.

In order to meet her burden of proof on Count I, Plaintiff must establish by a preponderance of the evidence each of the following necessary elements:

First, that in the proxy materials Defendants made an untrue statement of a material fact or omitted to state a material fact necessary in order to make the statements which were made, in light of the circumstances under which they were made, not misleading;

In order for alleged omitted or misstated facts to be "material" there must be a substantial likelihood that a reasonable shareholder would consider them important in deciding how to vote;

Second, that Plaintiff relied on such misstatement, whether it was an untrue statement of a material fact or a statement made misleading by omission of a fact necessary to be stated in order to make the statements which were made not misleading;

Third, that Defendants were negligent in making a misrepresentation or omission you may find occurred;

Fourth, that Defendants' conduct was the proximate cause of damage to Plaintiff; and

Fifth, that Defendants used or caused to be used, means and instrumentalities of interstate commerce in connection with the transaction.

AUTHORITY:

3 L. Sand, *et al.*, *Modern Federal Jury Instructions*, ¶ 82.02, Instruction 82-3 (1988) (modified); 3 E. Devitt, C. Blackmar and M. Wolff, *Federal Jury Practice and Instructions*, § 101.02 (1987) (modified). *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438 (1976); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 357, 384 (1970).

EXCERPTS FROM CORPORATE—DEFENDANTS' PROPOSED JURY INSTRUCTIONS

DEFENDANTS' PROPOSED JURY CHARGE NO. —

COUNT I—PARAGRAPH 29(b) OF THE AMENDED COMPLAINT

Plaintiff alleges that the following sentence from the proxy statement is a material misrepresentation:

> "The Plan of Merger has been approved by the Board of Directors because it provides an opportunity for the Bank's public shareholders to achieve a high value for their shares."

The Defendants deny that this is a misrepresentation, and contend that the members of the Bank's Board of Directors honestly believed that the merger price of $42 per share was high. The defendants also contend that this is a statement of the Board's opinion, not a statement of fact.

In order to establish this claim, Plaintiff must prove by a preponderance of the evidence that this statement in the proxy statement was a misrepresentation of a material fact. In addition, Plaintiff must establish each of the other necessary elements of liability, which I will more fully discuss later in my instructions.

AUTHORITY:

Amended Complaint, § 29(b); Proxy materials at 16; 3 E. Devitt, C. Blackmar & M. Wolff, *Federal Jury Practice and Instructions*, § 101.04 (1987) (modified); *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 444 (1976).

DEFENDANTS' PROPOSED JURY CHARGE NO. —

COUNT I—PARAGRAPH 29(d) OF THE AMENDED COMPLAINT

Plaintiff alleges that the following sentence from the proxy statement is a material misrepresentation:

> "FABI's Board of Directors commissioned Keefe, Bruyette & Woods, Inc., an independent investment banking firm, to pass on the fairness of the Merger from a financial point of view."

The Defendants contend that this statement is true, because Keefe, Bruyette & Woods, Inc. is an independent investment banking firm which did pass on the merger from a financial point of view.

In order to establish this claim, Plaintiff must prove by a preponderance of the evidence that this statement in the proxy statement was a misrepresentation of a material fact. In addition, Plaintiff must establish each of the other necessary elements of liability, which I will more fully discuss later in my instructions.

A "misrepresentation" is a statement that is not true.

AUTHORITY:

> Amended Complaint, § 29(d); Proxy materials at 3; 3 E. Devitt, C. Blackmar & M. Wolff, *Federal Jury Practice and Instructions*, § 101.04 (1987) (modified); *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 444 (1976).

DEFENDANTS' PROPOSED JURY CHARGE NO. —

COUNT I—SECOND ELEMENT— RELIANCE/MATERIALITY

The second element of Count I which Plaintiff must prove by a preponderance of the evidence is that she relied upon the Defendants' statements or that the proxy solicitation was an essential link in the accomplishment of the transaction.

To prove this element, Plaintiff must first establish that the alleged misstatements or omissions in the proxy statement were "material."

The law does not require a person buying or selling stock to state every fact about the stock which a shareholder might like to know and that might, if known, tend to influence his decision. For instance, even if you find that a particular statement of fact is plainly untruthful, you must also find that the fact misstated was of sufficient importance that it could reasonably be expected to induce a person to act or not to act before you may even consider whether there is liability for making the misstatement.

In regard to omissions, the law requires only that facts which are essential in order to make the statements made not misleading be included. The law is concerned only with omissions of facts which are essential to make the statements made not misleading and with misstatements of facts which are important enough to induce a person to vote in favor of the merger or not. And it is only the omission or misstatement of such important facts with which you should be concerned.

If Plaintiff proves that the alleged misstatements and omissions were made or omitted and that they are material as I have just defined that term, she may satisfy the necessary element of reliance if she proves that the

proxy solicitation was an essential link in the accomplishment of the transaction.

AUTHORITY:

2 E. Dewitt, C. Blackmar and M. Wolff, *Federal Jury Practice and Instructions*, § 54.08 (1977 and Supp. 1987); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970).

DEFENDANTS' PROPOSED JURY CHARGE NO. —

COUNT I—FOURTH ELEMENT—CAUSATION

The fourth element of Count I that Plaintiff must establish by a preponderance of the evidence is that the Defendants' conduct was the proximate cause of an injury to the Plaintiff.

In order for an act or omission to be considered a proximate cause of an injury, it must be a substantial factor in causing the damage and the injury must have been either a direct result or a reasonably probable consequence of the act or omission.

In order to satisfy this element, Plaintiff need not prove that Defendants' conduct was the only cause of the Plaintiff's injury. It is sufficient if you find that the actions of Defendants were a substantial and significant contributing cause to the injury which Plaintiff suffered. On the other hand, it is not enough for Plaintiff to recover if she merely shows that Defendants' actions caused her to engage in a particular securities transaction or that Plaintiff would have acted differently had she known the truth, unless she also proves she has been damaged as a consequence of material misstatement or omission.

AUTHORITY:

3 L. Sand, *et al.*, *Modern Federal Jury Instructions*, § 82.02, Instruction 82-9 (1988).

DEFENDANTS' PROPOSED JURY CHARGE NO. —

COUNT I—STATEMENT OF OPINION VERSUS STATEMENTS OF FACT

In considering the statements that Plaintiff alleges the Defendants expressed, you must distinguish between statements of fact and statements of opinion. In general, under the Act of 1934, misrepresentations or omissions must relate to facts that either exists at the time or before the time that the statement is made. Opinions about events that may or may not occur in the future generally do not constitute misrepresentations or omissions because they are not statements of fact. Statements about a company's present or past financial stability are considered expressions of fact. Statements about the prospects for a company's growth are considered expressions of opinion.

Plaintiff may not recover on her § 14(a) claim based on Defendants' expression of their opinion unless she can prove that Defendants did not believe that the opinion they expressed was untrue or unless Plaintiff could show that the opinion was unfounded or that Defendants made the statement negligently or with the intent to mislead.

AUTHORITY:

3 E. Dewitt, C. Blackmar and M. Wolff, *Federal Jury Practice and Instructions*, § 101.16 (1987).

DEFENDANTS' PROPOSED JURY CHARGE NO. —

COUNT I—"DISCLOSURE" EXPLAINED

Disclosure means a fair and adequate statement which conveys to a reasonable shareholder the true state of affairs of a company offering shares of stock. In considering whether or not a given material fact has been fairly and adequately disclosed and not misrepresented, you are instructed that the statement need not contain minute details but the thrust of the disclosure obligation is satisfied if sufficient details are provided in reasonably understandable language or figures so as to make the import of the disclosure understandable to a reasonable shareholder.

AUTHORITY:

3 E. Dewitt, C. Blackmar and M. Wolff, *Federal Jury Practice and Instructions*, § 101.10 (1987).

DEFENDANTS' PROPOSED JURY CHARGE NO. —

COUNT I—DAMAGES

If you should find, contrary to Defendants' contention that Defendants or any one of them violated the 1934 Act, then you may award to Plaintiff against any Defendants you find liable to her for such violation only those damages, if any, that you find from a preponderance of the evidence that she actually suffered as a result of any material misstatement or omission that you should find.

Even if you find a violation of the 1934 Act, if you further find that Plaintiff has suffered no injury as a result of any material misstatements or omissions in the proxy statements, then you must find for Defendants on Count I.

EXCERPTS FROM DIRECTORS'-DEFENDANTS' PROPOSED JURY INSTRUCTIONS

INSTRUCTION NO. 2

COUNT I—THE ELEMENTS

The plaintiff, Doris Sandberg, has the burden of proof in this case. That is, she must establish by a preponderance of the evidence each necessary element of the two causes of action she has alleged against the defendants.

In Count I of this case, Mrs. Sandberg has alleged that the defendants made misrepresentations and omitted to state material facts in the proxy materials circulated to her and the other shareholders of First American Bank of Virginia in preparation for the meeting of shareholders at which the merger transaction was considered and approved.

In order to meet her burden of proof on Count I, Mrs. Sandberg must establish by a preponderance of the evidence each of the following necessary elements:

First, that in the proxy materials the defendants made an untrue statement of a material fact or omitted to state a material fact necessary in order to make the statements which were made, in light of the circumstances under which they were made, not misleading;

Second, that Mrs. Sandberg relied on such misstatement, whether it was an untrue statement of a material fact or a statement made misleading by omission of a fact necessary to be stated in order to make the statements which were made not misleading.

Third, that the defendants were negligent in making a misrepresentation or omission that you may find occurred;

Fourth, that the defendants' conduct was the proximate cause of damage to Mrs. Sandberg; and

Fifth, that the defendants used or caused to be used, means and instrumentalities of interstate commerce in connection with the transaction.

3 L. Sand, *et al.*, *Modern Federal Jury Instructions*, ¶ 82.02, Instruction 82-3 (1988) (modified); 3 E. Devitt, C. Blackmar and M. Wolff, *Federal Jury Practice and Instructions*, § 101.02 (1987) (modified); 15 U.S.C. § 78n (a); 12 C.F.R. § 355-206.

INSTRUCTION NO. 4

COUNT I—FIRST ELEMENT—PARAGRAPH 29(b) OF THE AMENDED COMPLAINT

Mrs. Sandberg alleges that the following sentence from the proxy statement is a material misrepresentation:

"The Plan of Merger has been approved by the Board of Directors because it provides an opportunity for the Bank's public shareholders to achieve a high value for their shares."

The defendants deny that this is a misrepresentation because the merger price of $42 per share was high and was so considered by the defendants. The defendants also contend that this is a statement of the Board's opinion, not a statement of fact.

In order to establish this claim, Mrs. Sandberg must prove by a preponderance of the evidence that this statement in the proxy statement was a misrepresentation of a material fact. In addition, Mrs. Sandberg must establish each of the other necessary elements of liability, which I will more fully discuss later in my instructions.

A "misrepresentation" is a statement that is not true.

A "material" fact is a fact relating to a matter that would be of some importance or significance in the decisionmaking process of a reasonable shareholder, rather than simply a minor or trivial detail.

Amended Complaint, ¶ 29(b); Proxy materials at 16; 3 E. Devitt, C. Blackmar & M. Wolff, *Federal Jury Practice and Instructions*, § 101.04 (1987) (modified); *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 444 (1976); 15 U.S.C. § 78n(a); 12 C.F.R. § 355-206.

INSTRUCTION NO. 6

COUNT I—FIRST ELEMENT—PARAGRAPH 29(d) OF THE AMENDED COMPLAINT

Mrs. Sandberg alleges that the following sentence from the proxy statement is a material misrepresentation:

"FABI's Board of Directors commissioned Keefe, Bruyette & Woods, Inc., an independent investment banking firm, to pass on the fairness of ther Merger from a financial point of view."

The defendants contend that this statement is true, because Keefe, Bruyette & Woods, Inc. is an independent investment banking firm which FABI retained to assess the value of the minority shares, the key term of the merger from a financial point of view. The defendants also contend that it is not material, as that term will be defined for you, whether or not Keefe, Bruyette & Woods, Inc. was independent and whether it passed on the fairness of the merger.

In order to establish this claim, Mrs. Sandberg must prove by a preponderance of the evidence that this statement in the proxy statement was a misrepresentation of a material fact. In addition, Mrs. Sandberg must establish each of the other necessary elements of liability, which I will more fully discuss later in my instructions.

A "misrepresentation" is a statement that is not true.

A "material" fact is a fact relating to a matter that would be of some importance or significance in the decision making process of a reasonable shareholder, rather than a simply minor or trivial detail.

Amended Complaint, ¶ 29(d); Proxy material at 3; 3 E. Devitt, C. Blackmar & M. Wolff, *Federal Jury Practice and Instructions*, § 101.04 (1987) (modified); *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 444 (1976); 15 U.S.C. § 78n(a); 12 C.F.R. § 355-206.

INSTRUCTION NO. 9

COUNT I—SECOND ELEMENT—RELIANCE/ MATERIALITY

The second element of Count I which Mrs. Sandberg must prove by a preponderance of the evidence is that she relied upon the defendants' statements in the proxy materials.

To prove this element, Mrs. Sandberg must first establish that the alleged misstatements or omissions in the proxy statement were "material."

The law does not require the defendants to state every fact about the stock which a shareholder might like to know and that might, if known, tend to influence his or her decision. Thus, even if you find that a particular statement of fact is plainly untruthful, you must also find that the fact misstated was of sufficient importance that it could reasonably be expected to induce a person to act or not to act before you may even consider whether there is liability for making the misstatement.

In regard to omissions, the law requires only that facts which are essential in order to make the statements made not misleading be included.

And it is only the omission or misstatement of such important facts with which you should be concerned.

If Mrs. Sandberg proves that the alleged misstatements and omissions were made or omitted and that they are material as I have just defined that term, she may satisfy the necessary element of reliance if she proves that the proxy solicitation was an essential link in the accomplishment of the transaction.

2 E. Devitt, C. Blackmar and M. Wolff, *Federal Jury Practice and Instructions*, § 54.08 (1977 and Supp. 1987); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970); *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 444 (1976).

INSTRUCTION NO. 11

COUNT I—FOURTH ELEMENT—CAUSATION

The fourth element of Count I that Mrs. Sandberg must establish by a preponderance of the evidence is that the defendants' conduct was the proximate cause of an injury to the plaintiff.

In order for an act or omission to be considered a proximate cause of an injury, it must be a substantial factor in causing the damage and the injury must have been either a direct result or a reasonably probable consequence of the act or omission.

In order to satisfy this element, the plaintiff need not prove that the defendants' conduct as the only cause of the plaintiff's injury. It is sufficient if you find that the actions of the defendants were a substantial and significant contributing cause to the injury which the plaintiff suffered. On the other hand, it is not enough for Mrs. Sandberg to recover if she merely shows that defendants' actions cause her to engage in a particular securities transaction or that the plaintiff would have acted differently had she known the truth, unless she also proves she has been damaged as a consequence of a material misstatement or omission.

3 L. Sand, *et al.*, *Modern Federal Jury Instructions*, ¶ 82.02, Instruction 82-9 (1988).

INSTRUCTION NO. 13

COUNT I— STATEMENTS OF OPINION VERSUS STATEMENTS OF FACT

In considering the statements that the plaintiff alleges the defendants expressed, you must distinguish between statements of fact and statements of opinion. In general, under the Act of 1934, misrepresentations or omissions must relate to facts that exist either at the time or before the time that the statement is made. Opinions about events that may or may not occur in the future generally do not constitute misrepresentations or omissions because they are not statements of fact. Statements about a company's present or past financial stability are considered expressions of fact. Statements about the prospects for a company's growth are considered expressions of opinion.

Mrs. Sandberg may not recover on her § 14(a) claim based on the defendants' expression of their opinion unless she can prove that the defendants did not believe that the opinion they expressed was true or unless the plaintiff could show that the opinion was unfounded or that the defendants made the statement negligently or with the intent to mislead.

3 E. Devitt, C. Blackmar and M. Wolff, *Federal Jury Practice and Instructions*, § 101.16 (1987); *TSC Industries, Inc. v. Nothway, Inc.*, 426 U.S. 438 (1976); 15 U.S.C. § 78n(a); 12 C.F.R. § 355-206.

INSTRUCTION NO. 15

COUNT I—"DISCLOSURE" EXPLAINED

Disclosure means a fair and adequate statement which conveys to a reasonable shareholder the true state of affairs of a company offering shares of stock. In considering whether or not a given material fact has been fairly and adequately disclosed and not misrepresented, you are instructed that the statement need not contain minute details but the thrust of the disclosure obligation is satisfied if sufficient details are provided in reasonably understandable language or figures so as to make the import of the disclosure understandable to a reasonable shareholder.

3 E. Devitt, C. Blackmar and M. Wolff, *Federal Jury Practice and Instructions*, § 101.10 (1987).

DEFENDANTS' OPENING STATEMENTS TO JURY

* * * *

[40] MR. CAWLEY: Good morning, ladies and gentlemen of the jury. My name is Tom Cawley, and together with Mr. Steven Sayers, who is the gentlemen in the blue and red tie there, who is an attorney in our firm, I am proud to represent First American Bankshares, Inc. and Virginia Bankshares, Inc.

Seated to my left when I am at the counsel table is Mr. Clark Clifford. Mr. Clifford is a gentleman with a long and distinguished career in the Bar and in public service and the U. S. Government. He currently serves as chairman of First American Bankshares, Inc. He is the corporate representative, and he will also be testifying about some of these events.

As I listened to the opening statement of counsel for the plaintiff, I was struck by the exaggerations and ugly charges that were made in this case. I would ask you as members of the jury to listen to the evidence to see just how many of those charges actually are produced, to see for instance whether Mr. Beddow is the kind of person he has been portrayed as here today in the opening statement. I think that you are going to conclude that he was not.

[41] I think you are going to conclude that the holding company. First American Bankshares, Inc. acted in complete good faith in this transaction. They acted with the interests of the minority shareholders in mind.

I think also you are going to find that the directors of the Virginia Bank acted in complete good faith and acted with the interests of the minority shareholders. Listen to the evidence and see how much of the statements that you just heard Mr. Hassett tell you actually turn out to be the case when you consider the evidence.

The simple fact of this case is this: if anybody had gone up to Mrs. Sandberg and said to her prior to this transaction, "Mrs. Sandberg I understand you own some stock in Virginia Bank. How much is it worth?" She

would have said, "My stock is worth about $79,000," and the reason that she would have said that is because that's what the stock traded for, $32, $32.50 a share. It had been trading for that amount; that is to say people had bought and sold it for that amount for the past several years prior to this transaction, $32.50.

I think we were about 75 percent through the opening statement of Mr. Hassett before we even heard that figure of what the market value was of the stock. What did the stock buy and sell for. If a person sold it, what would they get? If a person wanted to buy some, what would they pay for it? [42] $32.50. The reason you didn't hear that is because if you listen to that figure and focus on that figure, you can see that the offer that the holding company made and was approved by the directors of the Virginia Bank was a generous offer. It was $42.

In other words, a person who just bought some stock or just some extra stock at $32 was all of a sudden going to get $42 for that stock that they purchased. So in effect, if someone said to Mrs. Sandberg, "How much is your stock worth," she would have said $75,000. And in fact several months later she was given a check for over $100,000 because of the decision of the holding company.

Now, secondly, you are going to find out that this transaction which is described in such a sinister fashion by Mr. Hassett is legal under Virginia law. The law permits a bank or any corporation to buy out its minority shares. Obviously, the reason is to promote efficiencies. Why would the bank holding company want to buy up the minority shares? Well, there's a number of reasons, and they really don't focus on money.

First of all, there are a number of regulatory requirements that have to be met and which are cumbersome when a bank holding company owns a bank in Virginia, for instance, and that bank has minority shares.

Secondly, of course, the very existence of the [43] holding company owning minority shares causes a number of

paperwork requirements. But more important than those two considerations, far more important is this fact: the holding company owns various banks. It owns the bank that we are talking about here today, First American Bank of Virginia. That is the first bank. It owns a similar bank in the District of Columbia. It owns one in Maryland.

Now, the minority shareholders we are talking about here today aren't minority shareholders of the holding company. They are minority shareholders of the Virginia bank. You are going to find out even from the person that—Mr. Krabill that is going to be called by the plaintiff, that it is very uncommon for a bank holding company to have an organization like the Virginia bank with itself having minority shares. It's a very unusual thing in America so it is not surprising that a holding company would want to take advantage of the Virginia law and to acquire those shares but also the holding company wants to do it fairly.

One of the reasons, though, as I said that it wants to do this is that in order to promote efficiencies, bank holding companies like to have a consolidation of some of the functions that they have for all of their banks.

For instance, all of their banks need a lot of data processing services. The Virginia bank needs it. Their D.C. banks need it, and their Maryland banks need it. There is a [44] problem, if you set up an organization to provide data processing services for all your banks, there is always a problem that the minority shareholders could say, hey, wait a minute. You are charging us too much for that service. That new organization you have set up to provide data processing is spending most of its time in D.C. We are not a shareholder in the D.C. bank. That is one of the main reasons. It promotes efficiency to acquire the minority. And it's permitted under the law of Virginia.

Now, as I said, at all times though the holding company wanted to do a fair transaction. It wanted to be sure that it treated the minority interest fairly.

Before I get into that, I have to explain something about the role of Mr. Clifford, whom I have introduced. Mr. Clifford occupies a very unusual position in the First American Bankshares, Inc. He is an attorney of long standing, and his law firm was involved in some of the legal work for the ultimate investors. Back in 1982, the ultimate investors asked Mr. Clifford if he would become the chairman of the bank and having experience in Government, in fact he served as Secretary of Defense in the Johnson administration, I think he made a very wise decision. He said, I would be happy to serve as chairman, but I would like complete autnority. I don't want always to have to be checking with the investors. I want authority to be able to run the bank. That authority [45] was given to Mr. Clifford. He has exercised that authority since 1982 in running the bank. He will explain the decisions in this case, and you can judge the validity of those decisions for yourself.

Now, back in July of 1986, the bank—the holding company which had been thinking about doing this kind of transaction for some time but not coming to any decision, decided to move that decision process along, and in July of 1986, they made a tentative decision to move that process along and to consider acquiring the minority interest but they didn't know what to pay for the minority interest, and they hadn't made a final decision.

Mr. Hassett said that a final decision was made in July of 1986 to go forward with this transaction. That is not the case. A tentative decision was made to go forward but the holding company didn't know what was fair to offer, so what did they do?

They said who is the best investment banking house in the United States that specializes in banks? There's a lot of investment bankers, but there is only several that specialize in banks themselves. One is called Keefe, Bruyette. Even Mr. Crabill, the person that the plaintiff is going to call is going to tell you that Keefe, Bruyette &

Woods is a recognized expert and one of the top banking experts in the country.

[46] So the holding company decided to retain Keefe, Bruyette to tell it what would be fair to pay for the shares of the minority that it wanted to acquire. Keefe, Bruyette are experts in this field, but just like First American Bankshares, Inc., is not just a corporation, it's really a group of individuals, Keefe, Bruyette is, too. And the individual you are going to hear from is Mr. Mike Connor. He is from New York. He is an investment banker. He specializes in bank stocks.

They asked Mike Connor to come up with a price to help them decide what would be fair to offer to the minority. Mike Connor and his organization had already done work for the bank so they knew a lot about the bank but in any event they still came down and met with various officers and employees of the bank. They reviewed lots of documents. They reviewed other transactions. They thought about it. They reviewed the market. They tested to see whether the market was valid. They tested, they looked into something called a rights offering which I will explain in a moment. And after doing that analysis, and they were hired about the beginning of December of 1986, they arrived at Mr. Clifford's office in the early part of January of 1987. And there was a meeting.

And Mike Connor and his associate, Mr. Boyle, came into that meeting and they said we think that the fair price [47] to pay would be $42 a share. Now, we realize that the market price that people have been buying and selling this stock is $32.50, and we think we can really justify paying a lot less. We can justify paying somewhere in the low 30's, anything over the market price, because anything over the market price is an amount greater than what anybody had before that time.

But he said we want this to be a friendly transaction. And we want to come up with a price that is so high that any reasonable shareholder will accept it, that this is so much above market that any reasonable person would

accept it. And that's why we think that $42 is not the minimum price you should pay but it's the maximum price you should pay. Anything more than that would just be unrealistic.

Secondy, you heard something about the fee structure. There was a very ugly implication in discussing the fee structure, that is to say, that when Keefe, Bruyette & Woods were hired, there's a two-tiered fee structure. They are to be paid $25,000 at the beginning and it would be paid $75,000 more if the transaction goes through.

The actual statement I believe that you heard was they paid $75,000 if they could go convince those Virginia directors. I don't think you are going to see that that is the fee structure.

You are also going to find out that that kind of two-tiered fee structure is absolutely standard in the [48] industry. Even Mr. Krabill, I think, will admit that is absolutely standard. There is nothing sinister or unusual about that kind of fee structure.

Now, Mr. Clifford sat at that meeting when Mr. Connor came in and said, I think you ought to pay $42. Mr. Clifford had been thinking about this process. Don't forget no final decision had been made as to whether to offer any amount. Mr. Clifford had been thinking about $38 a share. He thought that that would be fair because that would give $5 or $6 above the market and he thought that was a reasonable premium to pay, a reasonable bonus that would satisfy anyone. So he was quite frankly a little taken aback, I think, by the recommendation of the investment bankers to go up to $42.

Mr. Clifford will explain his reasoning as he decided okay, we have hired this investment banker. We want them to tell us what would be fair to pay for the minority, and so he decided all right, I'll pay $42. And so he made that decision. It didn't have to be a vote on it because as I said in that bank, Mr. Clifford makes the decisions, the key decisions like this.

What was the next step? They wanted to inform the Virginia Bank of this proposal. So they asked Mr. Drewer to come over. Mr. Drewer is the chairman of the board of the First American Bank of Virginia. He is also a stockholder. In fact, most of the directors that are sued are also [49] stockholders, so you can see that they have a tremendous interest in what they get for their shares. It's not a theoretical thing to them like it is for the experts you are going to hear about. It's realistic and reality to them because they own stocks, too, just as Mrs. Sandberg. Most of them own as much as Mrs. Sandberg.

Now, some of them own more, but in any event, Mr. Drewer came over. Mr. Clifford said, "Mr. Drewer, we have decided to acquire the minority interest, and we are offering a price of $42 a share." Obviously, the Virginia Bank directors have to make a decision on that. Mr. Drewer was very pleased with the price. Mr. Drewer is a person with long experience in the Virginia Bank, much longer really than Mr. Clifford has been involved with the holding company. In fact, you are going to find out that the directors here generally have tremendously long experience on that bank board, way before the holding company was really even involved with it.

You are also going to find out how much experience they have in business and education, in Government and other areas, the ladies and gentlemen on that board. But in any event, Mr. Drewer said he was very pleased and so he went back and they started the process at the Virginia Bank of considering this matter.

Now, it's interesting that of the 20-or-so directors [50] on the Virginia Bank, only Mr. Beddow from the holding company was a member of that board. You would think that since the holding company owns 85 percent of the stock of the holding company, that there would be all kinds of directors that had been placed there by the holding company, but in fact only Mr. Beddow was in fact from the holding company. The rest of the directors, most of them had been on for years before the holding com-

pany was even involved. And they stayed on year after year after year.

You are also going to find out that Mr. Beddow's role in this thing was very minimal. Mr. Hassett is going to try to build it up but listen to the facts and you will see how much did Mr. Beddow interfere with this process.

In any event, the bank set up an executive committee. Mr. Stump will tell you more about that. They start to consider the price. They had to consider the price not just for themselves because they were stockholders, but because they represented obviously the minority shareholders as well. And so they had to consider whether this offer was fair.

These were people that knew a lot about the bank. One of the things that they said was we would like to hear from the expert that was hired by the holding company. They knew that the expert was hired by the holding company. They said I would like to hear what those folks say from New York as to how they came up with $42.

[51] So they asked Keefe, Bruyette & Woods to come over and make a presentation. They knew that Keefe, Bruyette & Woods had been hired by the holding company. Keefe, Bruyette came over and they made their presentation. They were very impressed with the depth of knowledge that Keefe, Bruyette had on that bank. But still they did not make the decision on the spot. They still had to deliberate. They dismissed Keefe, Bruyette. They still deliberated and the executive committee eventually decided this is a fair price. In fact, I think they were concerned about the obligation they owed to the people out—the minority shareholders, who would be very upset if that price was not accepted, $32 for $42.

So they approved it. The executive committee recommended to the full board to approve it. The full board approved it. And then the mechanical things that are associated with putting together something called a proxy statement that went into effect.

At that point there was some assistance by the bank holding company's attorney, not to make the decision, no interference on the decision but just to put the mechanical pages together, mechanically to work on the kinds of legal language that has to be put. There has been some criticism of this proxy statement. I think you are going to be amazed when you see the length of the proxy statement. It's probably 50 pages long. We have said that the plaintiff's attorneys [52] have gone through this with a microscope and a tweezers to try to find anything they can that they say is wrong with it but I think you are going to see that the proxy statement is very factual. It's very fair. It's not at all deceptive.

This case comes down to the fact that the holding company did the right thing. It had the legal right to acquire the shares. It got good advice as to what was fair to the minority shareholders to offer. It ended up paying more than it started off to want to pay, but Mr. Clifford did come up from $38 to $42 because of the advice of the expert. It paid that, and everybody such as Mrs. Sandberg that formerly owned $32 stock ended up getting $42 for their shares.

I want to say one thing, too: one of the things that Keefe, Bruyette you are going to find analyzed, was something I referred to before called a stock offering, a stock rights offering. They work this way. Every now and then a corporation, and this can be true of banks or any corporation, will say to its stockholders if for every number of shares that you have we will let you buy another share.

Now, in 1986, just about ten months before this transaction, the Virginia Bank had a stock rights offering. It said everyone of our stockholders including the minority for each 28 shares that you own, you are going to be allowed to buy another share so it allowed the minority to buy more shares. What was the price that the minority including [53] Mrs. Sandberg had an opportunity to buy in at ten months before? $30, not even

$32. $30. And yet, Mrs. Sandberg took advantage of that and bought her shares, as she had a right to do, and bought stock at $30, the same stock which a year later she got $42 for but the interesting thing is that most of the shareholders who had a right to buy the stock even at $30 did not choose to do so. About a third did. About two-thirds didn't, even at $30 the year before.

You are going to see that Mr. Connor thought that was significant in his analysis of what this stock was worth.

This is an ugly charge that the bank holding company acted unfairly when in fact the converse was true. The bank holding company acted fairly. It acted in good faith. It did not attempt to coerce the directors. In fact, you are going to find out that those directors didn't get calls from Mr. Clifford or the other people from the bank. The holding company stayed away from the deliberations of the directors. They let these directors who are quite knowledgeable and experienced men and women make the decision on their own. And they approved it as well.

You may also be interested to know when this matter was put to a vote the great majority of minority shareholders voted for this transaction.

Ladies and gentlement, at the end of this case we will be asking you to return a verdict in favor of the [54] defendant holding company, First American Bankshares, Inc. and First Virginia Bankshares, Inc. I thank you very much for your attention.

MR. STUMP: Ladies and gentlemen, by this time I am sure you are interested in getting evidence and not hearing so much from lawyers. I will try to be as brief as I can consistent with covering what I think you are entitled to know before the case begins.

My name is John Stump. I represent the directors of First American Bank of Virginia or as Mr. Hassett chooses to call it, the bank. I will, too, because that is a little bit simpler. In the room with me are Sean Murphy,

who is behind Mr. Clifford, who is a partner of mine, also representing the directors, and Robert Vieth who is behind Mr. Drewer, who represents the directors.

The people that I represent in this case, most of them are here. Some of them were unable to be here.

The first director is Emanual A. Baker or Al Baker, who is the head of Town and Country Properties. Mr. Baker, would you rise so the jury can see you.

The second director is Jack Beddow, who is the holding company representative on the board. I would like him to rise. You all can sit back down if you like so they can identify each of you.

Harriet F. Bradley, or Happy Bradley, a former [55] member of the Fairfax County Board of Supervisors, who now lives on the Outer Banks of North Carolina, did not come up here; Joel T. Broyhill, a former congressman, and now in the steel business, director for over 25 years; Tom Chamberlin, who is a surveyor and now in business for himself in Arlington County; Tom Chisman, who is in the radio and television business in Tidewater and who is in Europe and not able to be here; Sidney Dewberry of Dewberry & Davis, the surveyors and engineers in Fairfax County; Mr. Drewer, who is the representative of the bank. He is the present chief executive officer of the bank. He has run this bank for over 25 years. It's this bank and its predecessors.

Eric Erdossy, the president of the bank by prearrangement is running a training session for bank people in Virginia Beach and not able to be here. George Johnson, the president of George Mason University, also a director of the bank; Charles T. Lindsay, Jr., who is an automobile dealer in Alexandria; Donald Maxfield, an accountant; Linda Michael, an architect here in Alexandria; Milton V. Peterson of Hazel, Peterson Companies; E. Guy Ridgely or Bill Ridgely, who was formerly the president of the bank of Alexandria, and now retired; Glenn Saunders, formerly of Gulf Reston and now a developer on his own in Fairfax County, can't be here

now but will be here later on; Charles H. Smith, Jr., or B. Smith, investor here in Alexandria; Verlin Smith, a real estate [56] developer for Fairfax County; Henry A. Thomas, a lawyer and Commissioner of Accounts in Alexandria, who is in Montana on a previously scheduled trip and unable to be here; and Stephen G. Yeonas, one of the brothers who founded the Yeonas Company and who is in business for himself in Arlington County.

It is these men and women that Mrs. Sandberg, dissatisfied with the over $100,000 that she received for her bank shares, is suing through her large Washington law firm, Hogan & Hartson, and charging with a breach of fiduciary duty in violation of the Securities laws.

The facts don't support it. Neither the facts that were known to the directors nor the facts that Hogan & Hartson have been able to develop and wish to trumpet as being facts that the directors did not at the time deliberated know and which I will try to review in going over the matter.

The directors heard about this. The first director to hear about it other than Mr. Beddow, the holding company representative who was privy to what went on at the holding company, was Mr. Drewer. On January 13, he was infomed that a proposal would be made, was being made to acquire the minority shares at $42 a share through the merger which as Mr. Cawley told you is a perfectly lawful, proper way to do it.

On the 15th, Mr. Drewer brought that information to the board of directors and informed the board of directors. [57] The board of directors began at that point its deliberations on what it should do with the offer. The first determination that it made was that it would refer the matter to its executive committee. The board of directors of the bank meet monthly. The executive committee of the bank meets every week. A bank board has many duties which require frequent meetings, and with a large board it is able to constitute an executive committee that can carry out the duties, the approval

of loans, the other things that a bank board has to do. They meet every week.

The executive committee was composed of permanent members. Mr. Drewer being one and several others that will testify before you and then all of the other members of the board in turn serve on the executive committee, about one-third of them at any particular time. At this particular time, the executive committee did not include Mr. Broyhill. However, Mr. Broyhill owned 31,250 shares of stock as a minority shareholder in a bank and he was added to the executive committee to be sure that the shareholder point of view was represented by an individual with a large personal stake as well as by the directors, each of whom was highly conscious as you will learn from their testimony when they are on the witness stand of their fiduciary responsibility to the others.

The executive committee meets even on the weeks [58] when the full board meets, and therefor after the board meeting was over on the 15th of January, the executive committee had its first meeting to consider what it ought to do in reference to this transaction. The first thing that it considered was whether it should go out and hire an appraiser of stock. That is, did it require outside information over and above what the directors themselves knew?

Now, you will learn that the average director of this bank has over ten years' service. As was pointed out, almost all of these directors antedate the interests of Mr. Clifford and his company in the bank. They are loyal to the bank and extremely knowledgeable. The determination was made before we knew that. We understand that the leading bank investment consulting firm in the United States has already been in this situation. Let's get them in. Find out what they did, what they learned and how they proceeded. And so on the 22nd of January when they intended to have them, a snowstorm intervened. On the 29th, two weeks later, the first meet-

ing that the New York people could come to, the investment bankers, came down to tell the board of directors how they had proceeded, what they had learned, what they had decided and why.

Now, Mr. Hassett was very careful not to tell you anything about all of this until he had gone in the fairyland to talk about a $60 to $61 number. The reason is a semantic [59] trick. You are supposed to be looking at $42 against this figure which we will learn a lot about in the course of the evidence, not against the real world figures, the book value of the bank. At that time the book value, that's the excess of the assets of the bank over the liabilities was $33.30. So that the offer price in the transaction was far above the book value. The market value, my friend, Mr. Cawley said was $32. I think maybe that was right, but you will learn that the market value was normally about $30 and indeed had been much lower in the recent past and has never been over $32 or $33.

The New York people when they came down explained to the directors first of all who they were; and then what they had done. They had gone into the financial history of the bank. They had looked at the bank's published financial statements. They had gone to the holding company and reviewed nonpublished information. In particular, they had sought to learn whether there were any values in the bank that were not publicly known so that that could become a part of their determination.

They looked at what are called peer group banks, that is other bank competing with First American in this geographic area. They looked at the stock prices of the peer group banks; and then they compared those prices and their movement of the First American Bank to determine whether a [60] valid market, that is a market that actually reflected what people were willing to pay for stock existed. They showed that the movements correlated and added validity to the market. They discussed the significance of the market price. The also looked

into the rights offer which Mr. Cawley mentioned which had occurred less than a year previously in which the minority shareholders like Mrs. Sandberg had been given an opportunity to buy bank stock at $30, and had turned it down, the majority of them.

There was an over allotment privilege, and therefore those, who like Mrs. Sandberg, chose to buy were able to get a little over half of the stock in the offering. So you will learn later on that a little more than half of it was sold to far less than half of the minority shareholders.

They also considered the fact that the appropriate way, according to the New York experts, to do this transaction to the best interests of all concerned and particularly the bank, was to pay a generous premium, because that would mean that everyone would be satisfied and would assure that there was a friendly transaction and no loss of support for the bank out in the community, which was important.

After Keefe, Bruyette left, the executive committee considered further whether there was any business purpose to be served by hiring another appraiser. And the conclusion [61] that you will hear from many of these directors, in fact all of them that will be permitted to testify before you, was that what Keefe, Bruyette had done was confirm the directors' own view, based on their knowledge and experience that this was an advantageous, generous price and that it was one that really they should not turn down because minority shareholders who wanted and needed the price would lose the deal should they turn it down.

At this point, however, the directors have, I think you will agree and I know Hogan & Hartson will trumpet really three choices: they could turn it down. They could accept it, or they could haggle over it.

The evidence will disclose that they negotiated through Mr. Beddow, that is, they determined whether there was any more money from the holding company, and Mr. Beddow told them there was no more money from the

holding company. That reduced their choices to two choices: accept it or reject it. The directors, several of them will also tell you that Mr. Beddow's answer seemed quite credible to them because they knew that in Maryland, a similar transaction was commenced, that is, the holding company commenced to try to acquire the minority shares in Maryland for a certain figure. The Maryland Bank Board made a counter offer, and the holding company said no, that is too much. And the transaction did not take place.

[62] In addition, the evidence I believe will persuade you that Mr. Beddow's answer that there was no more money was an accurate and truthful answer. The evidence will be that both Mr. Clifford, who the evidence will be unchallenged was in total, sole independent charge of the holding company, had been persuaded only with great difficulty to go up to $42, wanting as Mr. Cawley told you to pay $38.

The evidence will also be that Mr. Connor of Keefe, Bruyette would have been unwilling to recommend anything more than $42 to the holding company and was of the opinion by the way that $42 was fair to the minority shareholders, indeed generous. They came to the conclusion, which I submit was reasonable, a reasonable business judgment, that it was, that there was no purpose in hiring another appraiser. They had a transaction that they knew was a good one, and they knew that their obligation was to recommend it. They were unanimously of a mind to do so. And so that's what they did. They recommended it to the full board.

It came back to the full board at February 12; was discussed there completely, and was approved. The evidence will show in support of the decision of the directors, first the executive committee and then the full board, that this offer was a 26 percent premium over the net asset values of the bank. In other words, had the bank closed down the money had been able to realize on all of its assets, the money [63] distributed to Mrs. Sandberg and the other shareholders would have been substantially less than this offer. The evidence will show it was a 30-percent premium to the market price and the evidence, and there will be a chart in evidence, will show that the market price we are talking about was a higher price than historically the shares had commanded in the bank.

The evidence will show it was a 40-percent premium to the number at which less than a year previously most of the shareholders had voted with their feet by refusing to buy stock.

The evidence will show that the corroborating opinion of Keefe, Bruyette supported the decision of the directors, that the directors as shareholders had satisfied themselves and made a reasonable business judgment as to the fairness of the price.

It may be of some interest to you and this will also appear in the evidence, indeed Exhibit T which will be introduced, will give you more details about the length of service of the directors and their share ownings. Ten of these directors had more than 1,000 shares of stock themselves so they had a personal interest in a high price. Two of them had more than 5,000 shares, Mr. Drewer and I believe one of the other directors, I believe Mr. Yeonas. Mr. Broyhill as previously stated had 31,250 shares so they were making a business judgment in the exercise of their fiduciary duty but [64] it also had personal implications for them and their interests were the same as Mrs. Sandberg's interest.

This was also confirmed at the shareholder meeting where over two-thirds of the minority shareholders voted to support the transaction. Indeed, when you count the holding company's votes over 95 percent of the shareholders voted in favor of the transaction.

Now, the charge here as previously stated is not only of a breach of fiduciary duty, as Mr. Cawley put it, an ugly and serious charge, but there is also a charge of violation of the Securities laws; and this large law

firm in making that charge has gone through this lengthy proxy statement, and here is what they have extracted as the alleged violations of the Securities laws: first, that the proxy statement failed to disclose that the holding company had the power to elect the directors of the bank. The proxy materials which will be in evidence, that is the exhibit T I mentioned before, which has data about the directors, disclosed that the holding company owned 85 percent of the stock, that the stock had one vote per share, that no cumulative voting was permitted and that the holding company quote, "Already is in the position to control the bank," unquote.

The second charge is that the merger was approved because it gave an opportunity for the public shareholders to achieve a high value for their shares.

[65] This, I think, you already know, but you will certainly find out from the evidence was a numerically accurate statement. It was as stated a 26-percent premium over book. It was a 30-percent premium over market and it was a 40-percent premium over the price at which the minority shareholders had declined to buy in.

The third false statement was said to be that there were negotiations as to the terms of the merger. The first thing that I want you to notice about that when you have a chance to look at Exhibit T is that there is no such statement made in the proxy materials. The statement this is made, and it's true, is that Keefe, Bruyette did not participate in negotiations of the price; and that is true except to whatever extent the discussions at the meeting with the holding company might have been viewed as negotiations, but the evidence will show that Keefe, Bruyette merely told the holding company what Keefe, Bruyette thought and Keefe, Bruyette left. The hard bargaining was between Mr. Clifford and his advisers as they sought to bring him around to the view that he should be even more generous than he had planned to be.

It's also true that in at least the Webster dictionary definition of negotiation as conferring, discussing, or

bargaining to reach agreement, that there were negotiations, the evidence being that Mr. Yeonas confronted Mr. Beddow with whether there would be more money paid. [66] Mr. Johnson remembers asking Mr. Beddow, and I have already described Mr. Beddow, explained there was not so that a determination was made that more money was not available.

The fourth falsehood is that Keefe, Bruyette was an independent investment banking firm, commissioned to pass on the fairness of the merger. You will learn when Mr. Connor testifies that Keefe, Bruyette is indeed an independent, highly respected investment banking firm, and Mr. Krabill, the plaintiff's expert's view, one of the top ten in the United States of America.

You will certainly learn from the evidence that they were certainly commissioned to pass on the fairness of the merger. Indeed, the plaintiffs have tendered an exhibit which will come into evidence which their engagement letter which you can read and determine for yourself what they were employed to do.

The fifth falsehood is that the bank failed—this is not a falsehood—this is an alleged omission. The bank did not put some information in the proxy material concerning the values of the real estate of the bank which Hogan & Hartson believed or Mrs. Sandberg believed should have been in the proxy materials.

Now, the evidence will be that the statements of the bank were maintained in accordance with generally accepted accounting principles. The evidence will further be that [67] there were things about the bank, opinions people could have, values not reflected in the statements kept by generally accepted accounting principles that would have tended to increase the book value of the bank. Indeed, the real estate was one of those, and it would have increased the book value of the bank about $5 or $6.

The evidence will also be that there were other things not in the books of the bank and therefore not disclosed in the statements that would have reduced the value of the bank. For example, the bank was under reserved at

that time for loan losses. For example, the bank securities had not been marked to market. That is they were carried at their acquisition value and not at their market value. That alone would have reduced the value of the bank by over $1 million.

So that the evidence will be that the proxy statement contained the financial statements in the form that the accounting profession requires that they be set out. And there will be no evidence that this other material should have been in the proxy statement. Indeed, the only competent evidence on the subject will be that it played no part in the views of either Mr. Connor or Mr. Krabill, the experts, as to what the value was.

Finally, it says that the last lie was that the proxy material failed to disclose Mr. Beddow's role. The [68] proxy materials show that Mr. Beddow was an officer and director of First American Bankshares, that is the holding company. He signed the statements as—signed the agreement of merger as president of Virginia Bankshares. There simply will not be—there will be a total utter failure of proof on Count I. Indeed, I will be surprised if Judge Bryan does not withdraw it from your consideration.

As to the second count, a breach of fiduciary duty, these lawyers have taken between 28 and 30 depositions. They have filed five requests for production. They have filed eight sets of interrogatories in an unsuccessful effort to find some basis to challenge the business judgment of the board or find a deficiency in the proxy statement. Here is what they came up with.

Number one, as Mr. Hassett stressed to you, the Keefe, Bruyette fee arrangement was a two-tier—

THE COURT: Mr. Stump, you are arguing the case. While I have permitted that to some extent by everybody, it's more extreme at this stage.

MR. STUMP: I will try to calm down, Your Honor. I feel strongly about this case.

The Keefe, Bruyette fee arrangement was one of the things that they came up with. Their own expert will

testify it is the standard way these things are done. It's the way their expert's company does it and their expert will say [69] that he thinks it's the way Keefe, Bruyette always does it. The directors will tell you that if anything it gave Keefe, Bruyette an incentive in getting the right number so that both sides would find it acceptable as Connor testifies he thought it should be.

They will talk to you, as Mr. Hassett did, about the fact that the engagement letter which will be in evidence limited the uses of the opinion, the uses to which Keefe, Bruyette consented. The evidence will be that Keefe, Bruyette not only by action consented but did in fact consent, agree to come before the board and therefore there is no impropriety in Keefe, Bruyette's appearance before the board.

The evidence will be that they did not haggle and bargain. I think I have said enough about that as Judge Bryan admonished me.

It's necessary, ladies and gentlemen of the jury, to a recovery for Mrs. Sandberg if she can get a larger bonanza out of this deal that you find my client breached their fiduciary duty or violated the Securities laws. There will be no evidence of that. All of the evidence will be that they properly approved a fair price.

I ask that your verdict consider these men and women who did their best and got a good deal for the minority shareholders like Mrs. Sandberg.

THE COURT: We will take a short recess.

PRESENTATION OF PLAINTIFF'S CASE

TRIAL TESTIMONY OF DORIS I. SANDBERG

DIRECT EXAMINATION

* * * *

[8] BY MR. KEENEY:

Q I would like to direct your attention, Mrs. Sandberg, to statements in Plaintiff's Exhibit T. Can you turn please to page 16. My question to you, Mrs. Sandberg, when you received the proxy materials, did you read the sentence which says, "Keefe, Bruyette & Woods, Inc. did not participate in the negotiations in which the price per share to be paid was agreed upon."

A Yes.

Q What did that mean to you, if anything, when you read it?

MR. CAWLEY: Excuse me, Your Honor. I would object to this. As I understand it, Mrs. Sandberg voted against the transaction. I don't know what the probative value is of her indicating what any particular line of this lengthy proxy statement meant to her.

THE COURT: Is reliance an element of your case?

MR. KEENEY: No, Your Honor, reliance is not an element under Section 14 under which we are proceeding. What is an element, Your Honor, is materiality. As to materiality, we don't have to show it through Mrs. Sandberg. We can show it depending on any reasonable shareholder. And that's the purpose of these questions.

MR. STUMP: I would like to join in the objection, Your Honor. It seems to me that Mrs. Sandberg's interesting [9] statement as to how she interpreted something? The proxy material has no probative value.

THE COURT: Objection overruled.

BY MR. KEENEY:

Q Mrs. Sandberg, I am repeating the question. The question was, what did that mean to you, if anything?

A Well, I believe it would mean that I—I interpreted it to mean that there were negotiations that took place, but that Keefe, Bruyette was not a part of them.

MR. CAWLEY: Your Honor has ruled. I am not asking you to reconsider that, but is there a difference between her saying that this is now what her interpretation is or is she saying what her interpretation was at the time she read it prior to the time she filed the lawsuit?

THE COURT: If there is any difference, if there is, maybe you ought to ask her.

MR. CAWLEY: I believe, Your Honor, she is testifying to what she now interprets it a opposed to how she interpreted it at that time. Obviously, she is in a lawsuit now. I think that's improper for her to state what she believes now.

THE COURT: Why don't you ask her if that's how she interpreted it when you get the witness.

BY MR. KEENEY:

Q My question to you, Mrs. Sandberg, is what did that [10] mean to you if anything when you first read it back then, not now.

A Well, I believe that my interpretation of that would be at any time that there were negotiations but that this company was not a part of them.

Q I would like to direct your attention also to page 16—

THE COURT: (Interposing) Did you interpret it at all?

THE WITNESS: I beg pardon?

THE COURT: Did you give any thought at all at that time?

THE WITNESS: I believe I gave all of what I read thought.

BY MR. KEENEY:

Q Directing your attention also to page 16, a different sentence. I would like to direct your attention to the sentence that begins, quote, "The plan of merger has been approved by the board of directors, because it provides an opportunity for the bank's public shareholders to achieve a high value for their shares." Do you see that sentence? The sentence begins the third full paragraph.

A Wait. Which paragraph is that?

Q Third full paragraph, the sentence that begins, "The plan of merger," the first sentence, third full [11] paragraph. Do you see the sentence?

A Yes.

Q My question: when you received the proxy materials, did you read that sentence?

A I read all of the proxy statement, so I read that sentence along with everything else.

Q And what did that statement mean to you at that time?

A Well, it meant to me that they were approving this as being a high value.

Q Did you agree that it was a high value?

A No, I did not agree.

Q And why did you not agree that it was a high value?

A I didn't agree because as has been stated, the book value of the stock on December 31st, 1986, was $33.30 per share. They were offering me $42 a share. Now, January 1st, 1987, the tax laws were changed drastically, and the capital gains tax, the maximum Federal tax is 28 percent now. And my State tax is eight percent. And because I had been a stockholder for many years, I had almost 90 percent capital gains, so that the tax would take away to the point that my stock would be worth something like $29 a share after the tax came out. Right away I was losing between $9,000 and $10,000. Plus the fact that they had published in their annual statement that this stock had been appreciating at between 15 and [12] 16 percent a year for the last three years. And they were going to shut me out of this investment. At this point in my life, I am retired; I am not able to invest in anything that is speculative. And with what I had left after taxes, the best price that I could find, the best value appreciation-wise that I could find was something like nine percent, which is only about half of what I was getting as a stockholder with the First American Bank stock.

I had been counting on that as my hedge against inflation. So I felt that $42 did not give me a fair price.

Q Did you actually attend the shareholders' meeting on April 21st, 1987?

A Yes, I did.

Q Did you speak at the shareholders' meeting?

A Yes, I did.

Q What did you say?

A Well, I stayed away from the actual price. That had been—that had been addressed by many people, but there was one point that I felt had not been addressed, and which I was very curious, and I asked Mr. Drewer why, if they felt that they had to do this, and they stated that they started negotiations or started talking about this in January of 1987, why they couldn't have done this in 1986, when the tax implications would have been so much better for us.

Q What did Mr. Drewer say to you?

[13] A Mr. Drewer said, no, they didn't know anything about it before 1987, and he said that everyone of those directors were also shareholders, and they were also being hurt tax-wise by this. And my next question was then, well, why are you doing it?

And I can't remember his exact words, but either by gestures, body gesture or some words, I got the impression he didn't know.

Q But you don't recall the exact words today?

A No, I don't recall the exact words. I'm sorry.

Q Do you recall anything else that was discussed at the meeting by people other than yourself that you heard?

A Yes. There were many people who stood up and talked about this price—

MR. CAWLEY: Excuse me, Your Honor. I am going to object to the hearsay nature of this testimony.

MR. STUMP: I join in that objection, Your Honor. What other people said at the shareholders' meeting.

MR. KEENEY: I am not putting it in for the truth, Your Honor. I don't want people to think she is only giving half the story.

THE COURT: Objection sustained.

BY MR. KEENEY:

Q Mrs. Sandberg, did you actually cast a proxy for either in person or by proxy voting for or against this [14] transaction?

A I beg pardon? I did not hear you.

Q Excuse me. Let me speak louder. I'm sorry. That was my fault. Did you actually vote on this transaction at the April 21st, 1987 shareholders' meeting?

A Yes.

Q And how did you vote?

A I voted against it.

* * * *

CROSS EXAMINATION

* * * *

[23] Q Now, Mr. Keeney had you talk about a page, page 16 of the proxy statement. Is that correct?

A That is correct.

Q Now, you stated that you read the proxy statement when you received it?

A That is correct.

Q And after reading that, you decided to vote against the transaction?

A That is correct.

Q So that the proxy statement did not deceive you, you could read it and make up your mind whether to vote or not to vote in favor of the transaction, correct?

A Well, I made up my mind to vote against it, because I knew it would cost me money.

[24] Q I see. But in terms of the proxy statement, you read it generally, but you are not telling us that you really recall that, that you really recall reading that sentence and thinking about that sentence at the time that you read it? Or do you just recall reading the proxy statement?

A That is correct.

Q That you just recall reading the entire proxy statement?

A That is correct.

Q Now, in your lawsuit with respect to the proxy statement, there is a list of allegations of problems with that proxy statement. Did you come up with those problems after you read it, or were they done by somebody else?

A Well, I relied on my attorneys for a lot of it.

Q But they weren't problems in the proxy statement that you encountered as you went through the proxy statement that you made a list of?

A Well, I personally came up with the fact that I did not think that this was truly a fair price.

Q I know that that is your position.

A Other than that, and I also, there was another statement in there that I felt was misleading, and that was they said that it would be in the best interests of the bank because it would keep away from conflict of interest. Now, in the nearly 30 years that I have owned stock in the bank, I [25] have never heard of any conflict of interest. I never received any communication that there was any problem with conflict of interest with the minority stockholders. So I felt that was a misstatement also.

Q You had complete trust in the directors, didn't you?

A I had—I beg your pardon?

Q Didn't you trust the directors You knew them over the years?

A Yes. I felt that—yes, I felt that they—yes, I have no complaints with what they had done with the bank up until this time. That is why I wanted to stay a part of it.

* * * *

TESTIMONY OF DANIEL T. KRABILL

DIRECT EXAMINATION

* * * *

[72] Q Mr. Krabill, have you made a study to determine the fair value of the minority shares of First American Bank of Virginia?

[73] A I have, yes.

Q Were you able to reach any conclusion with a reasonable degree of certainty?

A Yes, I was.

Q What was your conclusion?

A My conclusion was that the fair value of the shares of First American Bank of Virginia as of February 12, 1987 was $60 per share.

Q Can you describe the basis for that conclusion?

A I used two different techniques to arrive at that value: one, we'll refer to as the dividend discount model.

Q What is that?

A The dividend discount model is a calculation of the value of the shares to the shareholders if they are allowed to continue to hold those shares based on the ability of the bank in this case to pay dividends. So it's the present value of the future dividends of the company. The dividends in turn relate to projections of future earnings, future growth of the company, and the need to retain a portion of those earnings in the business to fund further growth yet.

Q Is this dividend discount model unique to you, or is it used by others in your field?

A It is in common use in the field.

Q And what did you find using the dividend discount model, if anything?

[74] A Well, we came—we arrived at a value of $62.80 per share.

Q And what assumptions were made in your dividend discount model to arrive at that conclusion?

A Well, first, we assumed that the bank would continue at approximately its historical earnings performance. Second, we assumed that it would carry a capital ratio of 5.7 percent and be able to pay out earnings in excess of what was needed to retain that capital ratio. That capital ratio is approximately equal to what its capital ratio was at the end of 1986.

We assumed that growth would slow down to 12 percent per year in the next five years, after which point

we assumed it would grow at the inflation rate. And finally, we used a discount rate, that is assumed that a dollar of dividend one year out would be discounted back to the present at a rate of 12½ percent. That is the rate that the stock market was requiring of regional bank stocks similar to First American Bank of Virginia at that time.

Q And what is the effect of these assumptions that you made on the ultimate number that comes out of your dividend discount model?

A Well, the higher the earnings one would assume, the higher the value would be. In this case since the bank, which is a very good performer and a very strong grower, [75] since the bank is earning in excess of what the market is demanding of bank stocks, the more rapidly it grows, the higher the value you arrive at. On the other hand, if one were to use a much higher capital ratio, one would have to retain more earnings of the business. Dividends would be less, and the value would be lower.

Q I had interrupted you earlier when you had said you used two models. I interrupted you to ask some questions about the dividend discount model. Let me let you finish your answer. Did you use another model also?

A Yes, we did. Yes, we did. We analyzed the prices of comparable banking organizations in Virginia primarily. We looked at other banking organizations as well beyond Virginia to the Washington, D.C. metropolitan area, to the middle Atlantic States and to the Southeast generally.

Based on those stock prices, we made calculations as to the price at which this stock would have traded on the Friday before February 12, 1987, which I think was February 6, 1987, if there had been an active market in those shares.

Q We have already discussed a descriptive term for the dividend discount model. Is there any similar short-

hand descriptive term that we can use to that we don't have to go through so many words each time we discuss this second model?

A Well, there is none really in common use.

Q Can we agree on one, then?

[76] A We could use the term peer group comparables in talking about the stock prices of other similar banking organizations.

Q Is this model which we now have agreed to call peer group comparables unique to you or is it something relied upon by others in the field?

A It is used by others in the field including the Office of the Controller of the Currency when it appraises shares held by minority shareholders who dissent from merger transactions or other reorganizations and assert their dissenters' rights.

Q With respect to the peer groups that are chosen for the peer group comparables, could you explain to the ladies and gentlemen of the jury just in a little more detail which particular institutions you looked at?

A Okay. We selected the six largest banking organizations in Virginia. Those six were First Virginia Bank, Central Fidelity Banks, Sovran Financial Corporation, Signet Banking Corporation, United Virginia Bankshares, which is now called Crestar, and Dominion Bankshares.

Q What did you find when you looked at those six banks?

A Well, we did it two different ways. For the peer group of six, we calculated price earnings multiples, that is, the price of the stock relative to the earnings per share for [77] the year just ended. For each of the six stocks, we took the average of those six over the median, which is the mid point of the six and arrived at a price earnings ratio of 1.69 times, that is, if this were the sole indicator of the price at which First American Bank of Virginia stock would have traded at that date, it would have—I'm sorry—at a price earnings multiple of 10.39. That

was the median price earnings multiple. We applied that price earnings multiple of 10.39 to the earnings per share of First American Bank of Virginia of $5.10 and arrived at a price of 52.989 or $52.99.

Similarly, we took price to book multiples. Book value per share is defined as total shareholders' equity divided by the number of shares. We calculated price to book multiples for each of the comparison banks. We took the average of those, which was 1.69, and multiplied that by $33.30 per share, which was the book value of First American Bank of Virginia at year-end 1986, and arrived at a price of $58.28. We averaged those two and came up with a price by using the Virginia peers only of $54.63.

Q Did you look at any other peer groups in the course of your study?

A We looked at a number of peer groups. We also in particular looked at First Virginia Bank's which we viewed as the one banking organization in Virginia that is, and nationally, that is most similar to First American Bank of [78] Virginia. Both these banking organizations get more business in the Northern Virginia area, which we consider to be a very attractive market, one of the most attractive in the country; and they both have very strong market shares in that market.

Q What did you find when you looked at this particular bank?

A Using the same techniques as we did before for the peer group of six, that is, assuming we are using a peer group of one, First Virginia Banks, it was trading at a price earnings multiple of 11.55 times on February 6, 1987. We applied that price earnings multiple to the earnings of First American Bank of Virginia and came up with a price of $58.91. Similarly, we took its price to book multiple of 1.90 times the book value per share of First American Bank of Virginia; arrived at a price of $63.27. We averaged those two and we came up with a price of $61.09.

Q In your experience, was it usual or unusual that the two times you applied the peer group comparable model, you came up with numbers that aren't identical?

A It would be expected, yes.

Q And was it or was it not unusual that you came up with a different number on the dividend discount model than you did on the two times that you used what we are calling the peer group comparables model?

A Again, that would be expected. In this case they [79] were reasonably consistent.

Q Now, how does one derive your ultimate opinion of value which is $60 a share, from these various calculations?

A For starters, we assumed that the value would be somewhere between the $54.63 based on the stock prices of the six Virginia peers, and the $61.09 based on First Virginia Banks only. The value of $62, and I have got it, and 80¢ based on the dividend discount model, supported a value at the upper end of the range, as did the closer similarity between First American Bank of Virginia to First Virginia Banks and to the other five in the peer group. So we made the judgment that $60 was the fair value based on those figures.

Q So $60 is or is not an average?

A $60 is not an arithmetic average.

Q It reflects instead what?

A It reflects our judgment as to the value of those shares based on the prices at which the other Virginia banks were trading, including First Virginia Banks, and the projected future dividends and earnings of First American Bank of Virginia.

Q Have you done similar evaluations using similar techniques for other minority shares of other banks?

A Yes, we have.

Q Prior to this?

[80] A Yes, we have.

Q In your study, we have talked about various calculations. We have talked about different markets. Did you

also look at the market price of the shares of First American Bank of Virginia?

A Yes, we did.

Q What did you observe if anything?

A Well, in that case, we observed that the market for the shares of First American Bank of Virginia was very inactive. The market price of the shares was not consistent with that of other Virginia banking organizations or other banking organizations nationally.

Q And when you described as inactive, can you explain that a little bit more for us lay people?

A First, there was no market maker for those shares. There was no firms such as Merrill, Lynch or Johnston, Lemon or one of the local firms that was continually buying and selling shares of the stock and published quotes for those shares regularly. In addition, there was very little price movement in the shares. For example, the stock did not move by $5 during the last three-quarters of 1986. It was a constant quote.

Further, it was not listed on the NASDAQ, that is the National Association of Securities Dealers' national quotation system or some other national quotation system. [81] Further, we were not able through assessing, through looking at a number of public sources to determine the volume figures for the stock or to find regular quotes for it as we have looked back during 1988 trying to figure out facts about the stock during 1986 and 1987.

Q How if at all does market price fit into your analysis and conclusion about what the fair value of the share was?

A The market price of First American Bank of Virginia?

Q Yes.

A We were not able to use it.

Q And why not?

A Because it was not an active market and it did not, it was not consistent with the market for the shares of similar banking organizations.

Q Did you also look at the book value of shares of First American Bank of Virginia?

A Yes, we did.

Q And what if anything did you observe about the book value?

A Well, the book value was $33.30. We did some very rough calculation to try to go from that book value, which is based on historical accounting data, to a liquidation value of the bank as an attempt to get some idea of the value of the individual shares if it were to break up. We did not have [82] good data on that. As a general matter, we don't like to use liquidation value anyway, because the bank is a going concern. It is going to continue in business, and unless it has some very unusual values built in, that this bank did not seem to have, we do not use it.

Q How would you describe how the book value fits into your analysis or your conclusion?

A In our conclusion, it did not fit in directly. We used it for a calculation of the market price of this bank as if it had been trading in an active market as an independent entity. But we did not use it directly.

Q In the definition of book value, are there certain numbers that are excluded or included by convention in the use of the term book value?

A Well, shareholders' equity is the numerator. That is the accumulated value that is built up for the shareholders since the institution began through earnings and through contributions of capital through issuing the shares. And the denominator is the number of shares so you divide the equity by the number of shares.

Q Does book value reflect the current value of real estate?

A It does not. It reflects historical value as put on the books and then as depreciated over time. That is, if the value of the buildings, regardless of what's happening to the [83] value of the buildings, accounting sets up conventions to charge off a portion of the price of the

building against earnings every year so the value at which they are carried decreases over time regardless of what is happening to the market value.

Q In addition to the two techniques that you used and you testified about, the dividend discount model and what we have called the peer group comparables, were there any other techniques that you also used in your study?

A Well, in our analysis, we often use the price at which—control has been sold in other banking organizations.

Q Did you use that here?

A We did not use that here.

Q Why not?

A The reason was that we were not talking about a control situation. If we had used that type of value, we would have come somewhere between $80 and $100 per share.

Q But that would have been improper in your view to use that technique?

A In our view that did not fit with this situation.

Q Were there any other techniques that we have not discussed so far this afternoon?

A No, there are not.

Q In your study, did you also look at percentage of shares owned by majority shareholder of First American Bank of [84] Virginia?

A Well, it was hard not to. Yes, we did.

Q What was that percentage?

A 85 percent.

Q And how if at all does the presence of an 85-percent shareholder fit into your analysis and conclusion of $60 a share as a fair price for the shares?

A Well, in terms of the market price, the presence of the 85-percent shareholder was a factor that reduced the trading volume of the shares in the market and contributed to the inactive market for the shares but in terms of a direct calculation, we did not take it into ac-

count. We concluded that there was no discount that applied to the minority shareholders or that a share held by a minority shareholder was equal in value to a share held by the 85-percent shareholder.

Q Going back to something you said earlier about the effect of an 85-percent shareholder on the market, could you explain in a little more clarity perhaps what the effect is of an 85-percent shareholder on the market? Is it that only 15 percent of the shares are therefore available to trade, or is it something else?

A Well, that is part of it. That is a major part of it. Only 15 percent of the shares are available to trade. In addition, there is an uncertainty on the part of present and prospective shareholders as to what that 85-percent [85] shareholder might do. For instance, in this situation, the 85-percent shareholder decided that it wanted to be a 100-percent shareholder.

Q In your study, did you have an opportunity to review a fairness opinion by Keefe, Bruyette & Woods to First American Bankshares about this transaction?

A I did.

Q I am asking to be shown to you, and I believe it's in front of you, Plaintiff's Exhibit T, which is the proxy statement, which is in that binder. I am going to refer you to Appendix 3, to Plaintiff's Exhibit T, which is in evidence. That's the last two pages.

A I have it in front of me.

Q Do you have that in front of you? Thank you. In your study, did you make any observations about the form or the substance of the Keefe, Bruyette & Woods opinion letter?

A Yes, I did.

Q And what did you observe?

A Well, it was similar to fairness opinions that our firm writes, except in two regards. One, it was addressed to Mr. Stevens, the president and chief executive officer of First American Bankshares, Inc., while it was included in the materials sent to the shareholders of First

American Bank of Virginia, who were to vote on the merger.

And Second, in the final paragraph, it said that [86] based upon and subject to the foregoing, we are of the opinion that $42 per share represents a fair price for the shares of First American Bank of Virginia, not currently owned by the company. The letter does not say what all of our letters say and what letters written by other firms including other letters written by Keefe, Bruyette say, which is who the transaction is fair to. That is, in this case, since it's written to First American Bankshares, Inc., one would expect it to say a fair price to, or a fair price to First American Bankshares, Inc.

Q But it does not say that?

A It does not say that, or more accurately it would say to First American Bankshares, Inc., and its shareholders.

Q It does not say that either?

A It does not say that.

Q I would ask you to turn in the exhibits that are before to what has been marked for identification only at this point as Plaintiff's Exhibit X. Can you turn to that.

A I have it.

Q Can you describe for the record what Plaintiff's Exhibit X is? It's a collection of documents.

A It's a collection of documents. Since we—I believe 12 fairness opinions by Keefe, Bruyette & Woods.

Q Who collected those fairness opinions?

A My firm did.

[87] Q And why were those fairness opinions gathered?

A We wanted to confirm the wording on these fairness letters, and confirm that the wording on the letters written by Keefe, Bruyette & Woods in other situations was similar to that which I described as our practice and that of other firms in the practice, the general industry practice.

Q Were these selected by you and your firm from a greater collection of Keefe fairness opinions?

A They were not. They were selected from various proxy materials and other materials that our firm has in our library. The attempt was to find every fairness letter in our library, and we came up with about 100, including 12 from Keefe.

Q These 12 from Keefe, did they identify in the letter fair to whom?

A They all do, yes.

MR. KEENEY: Your Honor, we would like to move at this time Plaintiff's Exhibit X into evidence.

THE COURT: Any objection?

MR. CAWLEY: No objection, Your Honor.

No objection.

THE COURT: I will assume that each joins in the others' objections unless you tell me otherwise.

MR. STUMP: Yes, sir.

THE COURT: Be received in evidence.

[88] (Plaintiff's Exhibit X was received in evidence.)

MR. KEENEY: Thank you, Your Honor.

BY MR. KEENEY:

Q In your study, Mr. Krabill, did you also review an engagement letter between Keefe, Bruyette & Woods and First American Bankshares, Inc.?

A Yes, we did.

Q I would ask you to turn in the exhibit binder to what has been marked as Plaintiff's Exhibit 10-F, which I understand is already in evidence, in your exhibit binder—

A F?

Q F as in Frank.

Is Plaintiff's Exhibit F a copy of the engagement letter that you reviewed?

A Yes, it is.

Q Directing your attention to the second paragraph on page 2 of that letter, do you have a view whether or not that is a standard paragraph limiting use of the fairness opinion?

A Yes.

Q What is your view?

A That it is standard to, to limit the use of such an opinion, yes.

Q And in this case, the First American, which is referred to in that paragraph, to whose use it's limited, is [89] which entity?

A First American in this instance would refer to First American Bankshares, Inc.

Q Directing your attention at the same exhibit to the bottom of page 2, looking at the last paragraph, is there anything usual or unusual about the contingent-fee arrangement there described?

A This is a usual type of fee arrangement to have in engagements. This is an unusual engagement.

Q Can you explain what you mean by that?

A Well, the normal engagement—well, first of all, there are not a large number of situations like this with which we are dealing. The provisions of advice to the majority holder of a price they might pay for minority shares is not ordinarily done, and for that reason, in the normal way such an engagement would be carried out, I would assume that it would be for a fixed fee.

Q In your study, did you consider—

THE COURT: (Interposing) Before we leave that, I am not sure whether it's the usual type of fee arrangement or not.

THE WITNESS: Well, the normal type transaction that I am referring to is where an investment adviser is hired to advise on acquisition of 100 percent of the shares of a company. This is for acquisition of 15 percent of the shares [90] of a company on which they already own 85 percent.

BY MR. KEENEY:

Q Is there anything else unusual about not the fee arrangement but the engagement itself?

MR. CAWLEY: Excuse me. I don't think he answered your question.

THE COURT: I know he didn't, but I figured that we could move on. Counsel may clear it up.

MR. CAWLEY: Thank you.

BY MR. KEENEY:

Q Let me rephrase the Court's question to you. Can you explain what you meant by this being an unusual engagement?

A Well, the unusual thing about this engagement as it seems to have turned out was that Keefe, Bruyette & Woods was hired to provide a fairness opinion to the buyer. Keefe, Bruyette & Woods then proceeded to make a presentation to the board or committee of the board, I am not sure which, of the seller; and then the fairness letter that resulted from the engagement ended up in the material sent to the shareholders of the seller. And there was not a similar letter from an investment adviser to the buyer—I mean to the seller. There was no investment adviser to the seller.

Q In your study did you take into account that Keefe, Bruyette & Woods used a $42 a share figure?

[91] A Yes, we did.

Q Did you review any material of Keefe, Bruyette & Woods with respect to how they got to a $42 a share figure?

A Yes, we did.

Q What did you look at?

A The main thing they had, they had some calculations similar to the calculations we did on the stock prices of other Virginia banking organizations; and various multiples of priced earnings and price to book, I believe, for those stocks. They had some calculations that showed that within a fairly consistent range, the shares of First American Bank of Virginia were trading at about 60

percent of the multiples of the six peers they used, and in addition, they had some financial statements and some computer-generated printouts on financial ratios of First American Bank of Virginia.

Q Did you observe whether they chose for example the same peer groups to examine in terms of comparable banks that you did?

A The one they relied on most was the identical peer group that we chose.

Q If both experts are relying on the same peer group, how do you reach such different conclusions?

A The Keefe, Bruyette study took the market price and assumed or concluded that any premium over market price was fair to the shareholders of First American Bank of Virginia. [92] They attached a 30-percent premium to that market price to arrive at a price of $42 and concluded that was fair to the First American Bankshares, Inc. That is the buyer.

Q Did in your view, Keefe, Bruyette & Woods give full numerical effect to the full 100-percent comparable numbers with peer institution?

A No, they did not.

Q What didn't they do?

A They used the comparable institutions only to conclude that there was a consistent relationship between the market multiples of First American Bank of Virginia and the peer group they used.

Q So they used something less than 100 percent of what the comparables would be?

A They started with a price of approximately 60 percent of the comparables, yes.

Q And based on your review of their materials, do you have a view as to why they did that and if you do, whether that was correct?

A They relied almost exclusively on the market price and the value of the shares of First American Bank of Virginia as an indicator of the true value of those shares.

Q In addition to what you have described in terms of the various work papers that you looked at at Keefe, Bruyette & Woods—I realize that I interrupted you on your earlier [93] answer—did you look at anything else from Keefe, Bruyette & Woods?

A Anything else from Keefe, Bruyette & Woods?

Q Yes, or related to their analysis?

A I looked at the board presentation. They had data on a couple of—on three acquisitions in which control was acquired by another banking organization.

Q And what did you observe about those three acquisitions if anything?

A In those three cases, the control passed, was sold at approximately 30 percent above the market price of those shares prior to announcement of those transactions.

Q And do you have any understanding as to how those were selected?

A They were selected as being in approximately the geographic area of the country as, same geographic area as First American Bank of Virginia.

Q Do you have any understanding whether it reflected all such transactions in that geographical area as far as sampling?

A It selected three such transactions. In the three such transactions in the period of approximately six to nine months prior to this transaction, in the geographic area, they had.

Q Backing you up, Mr. Krabill, to something that you [94] said earlier, is it fair to say that you disagree that market price is the principal factor as Keefe, Bruyette found?

A In this case, yes, I disagree with that.

Q Why do you disagree?

A Because in this case the market value was very depressed by a number of factors.

Q Are you saying the market value does not reflect its fair value?

A In this particular instance, yes.

Q Can you explain why?

A Well, in the first place, the market was very inactive.

THE COURT: He has already gone through it.

MR. KEENEY: All right. Let me rephrase the question this way.

BY MR. KEENEY:

Q Is that for essentially the same reasons you have already discussed?

A Yes, it is.

Q In your study of the Keefe, Bruyette & Woods analysis, did you have an opportunity to review any depositions that were taken in this case?

A Yes, I did.

Q What depositions did you review?

A It was the deposition of Mr. Connor.

[95] Q Mr. Connor is who?

A He is the individual at Keefe, Bruyette & Woods who signed the engagement letter and the fairness letter.

Q In your study of Keefe, Bruyette & Woods' analysis, did you look at prior experience that Keefe has had if any in deals of this sort?

A Yes, I did.

Q What did you observe?

A Keefe has been involved in, prior to this transaction was involved in one other transaction of this type.

Q What transaction is that?

A That was in 1985, First American Bank of Maryland was trying to acquire the remaining shares that were not held--when First American Bankshares, Inc. was trying to acquire the remaining shares of First American Bank of Maryland, that it had not previously owned.

Q What happened there?

A In that case, Keefe, Bruyette & Woods was hired by First American Bankshares, Inc. They concluded that

a price of $36 a share was fair for that, for First American Bank of Maryland. First American Bankshares took that offer to the board of First American Bank of Maryland. That board selected its own financial adviser who concluded that the fair price was $37. After that, the offer was dropped.

* * * *

[96] Q As part of this study, did you look at the effect of paying $60 a share instead of $42 a share with respect to First American Bankshares, Inc.?

A Yes, I did.

Q Were you able to reach any conclusion with a reasonable degree of certainty?

A Yes, I was.

Q What was that conclusion?

A Well, I applied two different valuation techniques to this transaction from the point of view of First American Bankshares. First, I calculated the impact of the transaction on the first year earnings, that is, the earnings following the closing of the transaction. I assumed in that case that the transaction would close on the last day of 1986; and then I used a projection that I made of 1987 earnings for First American Bank of Virginia along with tax rates that were in [97] effect and the interest rates that were in effect at that time.

Q And what did you conclude?

A I concluded that it would have a positive effect on the earnings of First American Bank of Virginia, the first year after such transaction on the order of about $850,000 if it were to acquire the minority shares for $60 cash.

Q And in addition to the model that you have just discussed, where you reached that conclusion, did you use any other models also to reach that conclusion?

A Yes, I did. I used dividend discount model. That is the same model I used in looking at the value of the shares from the point of view of the 15-percent shareholders and arrived at a value of $62.80 per share.

Q Just so you can refresh all of us, because it's been a while since we discussed the dividend discount model, can you explain how that applies in these circumstances?

A Well, it applies equally to the former shareholders and the new shareholders of those shares. The earnings to be generated by the company did not seem to be impacted by the existence of the transaction. Therefore, the earnings accrued to each shareholder seem not to be affected by the transaction, therefore the value of those shares whether held by the minority shareholders, the 15 percent, or the 85-percent shareholder that was becoming a 100-percent shareholder, was identical.

* * * *

[98] Q During the pendency of this lawsuit, and I am not going to ask you details, but have there been numerically any other deals in this geographical area involving acquisitions of minority interests? I am only going to ask you for a number.

A Yes.

Q And how many?

A One minority interest, one 50-percent interest.

Q I am going to show the witness for identification only what is in your binder as Plaintiff's Exhibit D, that's behind Tab D for Daniel.

The first question is could you identify what document Plaintiff's Exhibit D is for the record?

A Okay. Exhibit D is a memorandum dated June 11, 1986, from Mr. Scoffone of First American Bankshares, Inc. to Mr. Beddow of First American Bankshares, Inc.

Q Did you review it in the course of your analysis?

[99] A Yes, I did.

Q Are you familiar with the type of analysis in that memo?

A Yes, I am.

Q Does it have a name?

A I would describe it as first year break even analysis, yes.

Q And is first year break even analysis standard in your field or not standard?

A Yes, we always calculate this as we contemplate a transaction.

Q What does a first year break even analysis show or attempt to do?

A Well, it is exactly the first of the two methods I used in calculating the value of the shares, or whether a price of $60 made sense to First American Bankshares, Inc.

Q And is the analysis that you did similar to the analysis that is done in the memorandum marked Plaintiff's Exhibit D?

A It is, yes.

Q Do you have an opinion as to whether it's appropriate to do that sort of analysis?

A Yes, it is.

Q And your opinion is also yes, it is?

A Yes.

[100] Q I would like to draw your attention to Plaintiff's Exhibit, I believe it's T. Excuse me one minute, Your Honor.

Sorry. I misspoke. I would like to draw your attention to Plaintiff's Exhibit Y. I misread it. Can you get that in front of you?

A Yes.

Q Is your signature on the document, which it marked as Plaintiff's Exhibit Y?

A Yes, it is.

Q Can you explain for the record what Plaintiff's Exhibit Y is?

A It is a letter from me to Judge Paul Weinstein, dated April 8, 1987, in which we conclude that our preliminary assessment is that upon full analysis we determined that the fair price of the shares, that is the shares of First American Bank of Virginia, is approximately 33 percent to 40 percent higher than the $42 price proposed to be paid to the minority shareholders by First American Bankshares.

Q If you were writing that letter today, is there anything in that sentence that you would change?

A Well, when I pick it up, approximately a year after it was written, I was a little surprised that it said approximately 30 to 40 percent higher. My recollection of my views at the time was that it was at least 33 to 40 percent higher.

[101] Q Can you explain why the word preliminary is used?

A Well, this letter was written less than two weeks after I became involved in the assignment. At the time it was written, we were under the belief that we may later be required to form a more detailed analysis of the value of the shares. When we performed this analysis, we lacked certain data we would have liked to have in writing this letter, in particular first quarter 1987 financial statements for First American Bank of Virginia, and other types of internal documents that one often has when one writes such a letter.

Q In your analysis, did you look at the 1986 earnings figures for First American Bank of Virginia as those figures were used by Keefe, Bruyette & Woods?

A Yes, we did.

Q What if anything did you observe?

A Well, at various points in the analysis performed by Keefe, they were using different figures for earnings per share.

Q When they used different earnings per share figures, did their $42 a share conclusion change?

A It did not seem to.

Q What does that demonstrate to you if anything?

A Well, first of all, it demonstrates that they were performing their analysis before final figures for the year 1986 were in and as those figures got finalized, they moved [102] from, I believe, $4.77 per share to $5.06 per share and ultimately to $5.10 per share that was actually reported.

During the course of this analysis however it does not seem that their conclusion changed.

MR. KEENEY: Your Honor, at this point we have no further questions of the witness. We would like to approach the Bench on one matter.

THE COURT: All right.

(Whereupon, a conference was held at the Bench with Court and counsel, out of hearing of the jury, and reported as follows:)

MR. HASSETT: Your Honor, I just wanted to be heard just briefly with respect to your sustaining the objection about the Maryland transaction, Your Honor. You have heard defendants are arguing that the directors used good judgment because they knew what happened in Maryland, that the offer was made of $30 and there was independent analysis which said gee, it's worth $37. Then the offer was withdrawn. So they are arguing that was good judgment on the part of the directors of the Virginia bank to say well, let's not lose the deal like they did in Maryland. The fact is, Your Honor, that in Maryland, after the board hired their own adviser, told them the stock was worth more, the holding company temporarily withdrew the offer, but have come back with the same for $42, in other words, a much higher offer. [103] Exhibit J, Mr. Stump says that is all after this transaction, but Exhibit J is a memo from Mr. Scoffone in January of this year where the holding company was considering both of these transactions together, Maryland and Virginia. They excised all the Maryland from what they gave us, but I am confident that the reference in there is planning out material, I am confident relates to Maryland. So it's not accurate, I don't think, Your Honor.

THE COURT: If they go into it, then I will let you come back with it. But at this stage I will adhere to the ruling.

MR. STUMP: Your Honor, we judge that they knew what happened therefore by what happened. We can't judge about what happened in the future.

THE COURT: Sometimes what happens in the future bears on whether their judgment was correct.

If they go into it, then I will let you bring out the full story to the extent that is necessary to correct any impression that you think they may have left so we will face that when it comes up.

* * * *

CROSS-EXAMINATION

[107] Q Do you know Keefe, Bruyette & Woods by reputation?

A Yes, I do.

Q Is their reputation good?

A Yes.

Q Are they respected?

A Yes.

Q Do they publish data on banks?

A Yes, they do.

[108] Q How many banks?

A All 14,000 in the country.

Q Would you say that Keefe, Bruyette is one of the top ten firms in the country in this field?

A In the field of publishing data, yes.

Q And in the field of looking at and dealing with banking securities transactions?

A Yes, I would.

Q Does your firm buy data from Keefe, Bruyette?

A Yes, we do.

Q Do you consider Keefe, Bruyette an appropriate source of information in a transaction of this sort?

A For us, no.

Q No, not for you. For First American Bankshares or the directors to call up?

A Yes.

Q The two-tier fee, as I understand it, is common in the investment banking industry?

A Yes, it is.

Q Your company uses it, do you not?
A In certain situations, yes.
Q It's your understanding, isn't it, that Keefe, Bruyette always uses it?
A As I recall from Mr. Connor's deposition, yes.
Q And your own independent information is— [109] corroborates that, does it not?
A There is nothing to the contrary that I have seen.

* * * *

TESTIMONY OF A. VINCENT SCOFFONE

DIRECT EXAMINATION

* * * *

[140] Q You are employed, are you not, by First American Bankshares, Inc.?
A Yes, that's correct.
Q For how long have you been employed by First American Bankshares, Inc.?
A Over 22 years.
Q It had other names up until approximately 1982?
A That's correct.
Q What is your present title or titles for First American Bankshares, Inc.?
A My title is senior vice president and treasurer.
Q In practical terms, you are the senior accounting officer for First American Bankshares?
A Yes, that's correct.
Q Are you employed by First American Bank of Virginia?
A No, I am not.
Q Have you ever been employed by First American Bank of Virginia?
A No, I have not.
Q What is Virginia Bankshares, Inc.?
A Virginia Bankshares is a holding company that is between First American Bankshares and First American Bank of Virginia.

[141] Q Again, in practical terms, First American Bankshares, Inc. owns all of Virginia Bankshares, is that right?
A Yes, that's correct.
Q And Virginia Bankshares now owns all of First American Bank of Virginia?
A Yes, that's correct.
Q Up until the spring of 1987, it owned 85 percent of the First American Bank of Virginia?
A Yes, that's correct.
Q Does Virginia Bankshares, Inc. do anything besides own First American Bank of Virginia?
A No, it does not.
Q Are you an officer of Virginia Bankshares, Inc.?
A Yes, I am.
Q What is your title there, please?
A I believe I am vice president and treasurer.

* * * *

[143] Q Mr. Scoffone, one of your duties for the holding company is to perform financial analyses of transactions that the holding company is contemplating; isn't that right?
A Yes.
Q In simple terms, you do projections for the holding company on how much a deal will cost them or how much they can expect to make from a deal. Is that right?
A Yes.
[144] Q Now, one such transaction that you analyzed was the potential acquisition by the holding company of the 15 percent of the stock of the bank that was still owned by the public; right?
A That's correct.
Q Do you know when you first performed an analysis of that transaction?
A I believe it was early in 1986, but I can't recall specifically.
Q Sorry I interrupted you. Mr. Scoffone, let me ask you if you would, you have before you the plaintiff's ex-

hibit notebook, if you would turn please to Exhibit C for identification. Do you have that before you?

A Yes, I do.

Q Tell me what that is, please.

A It's a memorandum from myself to Robert E. Altman regarding the acquisition of the Virginia minority interest.

Q What is the date of it?

A February 10, 1986.

Q And had Mr. Altman asked you to perform that analysis of the acquisition of First American Bank of Virginia?

A I don't believe Mr. Altman did, no.

Q Mr. Scoffone, to whom is this memo directed?

A It is directed to Mr. Altman.

[145] Q By whom is it written?

A By myself.

Q Would you read the first five words of the memo.

A It says, "You have requested an analysis of the acquisitions."

Q Is the "you" Mr. Altman that you are referring to there?

A Yes, that's correct.

Q Is it your testimony now, that Mr. Altman in fact had not requested such an analysis?

A He didn't request it to me directly. I believe he requested it of either Mr. Stevens or Mr. Beddow to have me do an analysis.

Q Do you recall how long prior to February 10 you were asked to do this?

A No, I do not.

Q Can you give me your best estimate of how long it would take you to perform such an analysis? Is it something done in a day or a week or a month?

A A couple of days.

Q Now in this memorandum that's been marked as Exhibit C, that you wrote to Mr. Altman, would you turn

to the third page, please. Do you see the paragraph labeled "Summary" there

A Yes, I do.

[146] Q You state in that paragraph, do you not, that it's your opinion that the acquisition of the outstanding 15 percent of the shares should be a top priority for the holding company, do you not?

A Yes.

Q You felt that way in February of 1986?

A Yes, I did.

Q Am I correct that you continued to feel that way throughout 1986 and 1987 until this acquisition was accomplished?

A Yes, I did.

* * * *

BY MR. MERNICK:

Q Did you get any response to this memo, this Exhibit C?

A I don't recall whether I did or not.

Q Now, you prepared a similar memo four months later, [147] didn't you?

A I seem to recall that, yes. I don't exactly know what the date of the memo was.

Q Turn if you would to the very next exhibit in the notebook, Exhibit D. What is that, please?

A It's a memo from myself to Jack Beddow titled, "Acquisition of Virginia Minority Interest."

Q And is this the same analysis with updated figures as was apparently from Exhibit C?

A Yes, that's correct.

Q Did you give it to Mr. Beddow?

A Yes, I did.

Q Did you give it to anyone else?

A I might have carboned Mr. Stevens on it. I don't recall.

Q But you are the author of this two-page memo? Is that correct?

A Yes, that's correct.

Q And of the one-page chart that's attached to it

A Yes, that's correct.

Q And you prepared this in the course of your duties as chief accounting officer of the holding company?

A Yes. That's correct.

* * * *

[148] Q Mr. Scoffone, in this memo, Exhibit D, you repeat your view on page 2, do you not, that the acquisition of the minority shares should be a top priority item for the company?

A Yes, I do.

Q Did anyone from the holding company ever comment to you about your comment in this memo that it ought to be a top priority of the company?

A I am not sure that I recall whether anybody did or not. I think the general feeling was that it would be a good idea to acquire the minority interest at Virginia.

Q Isn't it a fact that Mr. Stevens at one point agreed [149] with you and said he agreed with you that it ought to be a top priority of the company?

A I believe, yes. Mr. Stevens did agree with me.

Q Let's turn if we can to the third page of Exhibit D, which is the chart entitled, "Assumption, 100 Percent Acquisition." Do you have that in front of you?

A Yes, I do.

Q Am I correct that what you were doing in this chart was selecting various prices, hypothetical prices for the minority stock and illustrating the financial consequences to the holding company of paying each of these different prices? Is that right?

A Yes, that's correct.

Q And the prices you used were $32, $40, $46 and $61. Is that right?

A Yes, that's correct.

Q Did anyone suggest these prices to you, or did you come up with them yourself?

A I came up with them—excuse me—I came up with them myself.

Q You picked them because they were multiples of book value?

A Yes, that's correct.

Q Why did you use multiples of book value?

A I tried to—I used the multiples because that is [150] what I think people are most familiar with when they talk about an acquisition, how much of it, what price would it be as to book. I just used something that people would be able to refer to, give them a range of what the multiples would be at current market and up to two times book.

Q Now, the book value in fact used on this chart was $30.70, correct?

A Yes. That's correct.

Q And my year end, 1986, December 31, 1986, the book value in fact was $33.30, was it not?

A If you say so. I don't recall.

Q You recall it was approximately $33.30?

A It sounds about right, but I can't speak to that specifically unless you show me something that I can refer

THE COURT: Why don't we just assume that.

BY MR. MERNICK:

Q Was it easily predictable in June or July 1986 what book value would be by the end of the year? In fact, didn't you just need to add in what retained earnings would be for the rest of the year?

A I wouldn't use the term easy. You have to make a number of assumptions. You take the actual and have to project out what it would be for the half year and projections are not easy to calculate. They take into account many factors, many variables, many assumptions. [151] Q Now, the 1986 per share you used here is $5.05, right?

A Yes.

Q And in June 1986 you couldn't know with certainty what the 1986 earnings per share would be, could you?

A No, I could not.

Q So this was a projection on your part of $5.05?
A Yes, that's correct.
Q Actual earnings that year turned out to be $5.10?
A If you say that's what they were. I don't remember.
Q Had you used the book value of year end 1986 of $33.30, would the prices by which your analysis was done have increased?
A Yes, they would have.
Q Two times book value, which is the $61 figure that you are using in fact would have been $66 or $67?
A That's correct.
Q If you would, please help me to understand the terms that you are using at the bottom of this chart, under the heading of net income effect analyzed, the first item interest expense at 9.5 percent. Am I correct that what this means is that the holding company went out and borrowed every nickel to pay for these shares it was acquiring; this is how much interest they would have to pay each year if the interest rate was 9.5 percent?
[152] A That's correct.
Q The second entry, tax benefit from interest at 46 percent. Does this mean that since interest is deductible on your taxes, if you have to pay $5 million in interest, you get to deduct that $5 million and at a 56 percent tax rate, this is how much you get right back in tax savings?
A That's correct.
Q The third entry is increased dividend—I'm sorry—the bank paid a dividend each year to its shareholders; both the holding company and the minority, right?
A Yes.
Q And that dividend each year was $1.20?
A I seem to recall that, yes.
Q So this entry means that if you were to buy up the 735,000 shares that the minority held, one of the benefits to you would be you would get $1.20 a year for every one of those shares you had just bought that you didn't previously own? Right?
A That's correct.

Q Now, the fourth entry is increased equity and undistributed earnings based on 1986 budget. Do I correctly understand what that is is increased equity and undistributed earnings means if the bank makes $5 per year per share and pays out $1.20 in dividends and reinvests the other $3.80 to pay—those are the undistributed earnings, that $3.80 per [153] share?
A That's correct.
Q If you are using $5.05, in fact that is $3.85 per share, that accounts for the $1.20 dividend, right?
A I assume that, yes.
Q The last entry, goodwill amortization on a 20-year basis, what is that?
A It's the annual amortization of the goodwill paid for stock purchased at above book value.
Q What is the goodwill that you are purchasing?
A It's simply the calculation, the difference between the purchase price and the book value, so if the purchase price is $10, and the value is $30, you are paying $10 in goodwill and that has to be amortized over a period of time, and the convention in our company is over a 20-year period.
Q Now, you pay that once at the time you pay the shareholders for their shares, you pay that out, is that right?
A Yes.
Q So that's reflected in the gross purchase price?
A Yes.
Q And you are not paying out that difference again on an annual basis?
A No. That's correct.
Q So what you are doing here in fact, you are not paying out any more money on an annual basis in terms of the [154] cost of acquiring those shares, right? It's a one-time experience?
A That's correct.
Q So what you are doing here is basically an accounting exercise so that the books match after 20 years?
A Yes, that's correct.

Q But no money is changing hands here?
A That's correct.
Q So when we get down to increased net income, even though that shows that you have subtracted out an amount for goodwill amortization, in fact you haven't paid out that sum, you haven't taken that sum out of your profits for the year in terms of a cash outlay, have you?
A It's not a cash outlay, but it is an accounting outlay.
Q This figure at the bottom, increased net income, that is not intended to represent what the company's return on its investment would be, is it?
A No, it's not.
Q In other words, you are not saying in the case of the $61 per share, an example that you have used, which has a total acquisition cost of $44,849,000 to buy 735,000 shares at $61 apiece, you are not saying that your return on that $45 million investment will be $299,000, are you?
A Yes, I am saying that. I'm sorry. I apologize.
[155] Q You are saying that?
A I am saying that.
Q That your return will be $300,000?
A Yes.
Q And does that return of $300,000 represent the extent of the financial benefits to the company from that $45 million investment?
A To my knowledge, yes, it is.
Q Well, isn't it the case, sir, that if the company used entirely borrowed funds for this transaction, that after paying off all of its interest costs, it would still receive undistributed income here shown here of $2.8 million a year and the dividends of $883,000 per year and the tax benefit of $1,960,000 per year. Is that right?
A Do you want to repeat that again? I'm sorry.
Q Following along at the bottom of that exhibit.
A Right.

Q The company used entirely borrowed funds to purchase these shares?
A That's correct. This is what assumption he is making.
Q Right. It would have to pay $4.26 million in interest, correct?
A Yes.
Q That is money out the door on interest?
[156] A Correct.
Q It would get back $1,960,000 in taxes owed or tax benefits?
A Yes.
Q It would get $883,000 in dividends, correct?
A That's correct.
Q And it would get $2.8 million in undistributed earnings, that's in effect reinvested in the bank it now owns?
A Yes. That's correct.
Q If you add up those three figures, don't you get a figure that is $1.4 million higher than the interest that they are paying?
A Yes.
Q Isn't that in fact what the benefit is to the bank of that transaction to the holding company?
A No.
Q Because I haven't taken into account this accounting exercise, this writing off of goodwill over 20 years?
A Also, the increase on undistributed earnings is also on account of convention. It's not real money to the holding company.
Q It's real money to the bank, isn't it?
A It's real money to the bank, yes.
Q The holding company owns the bank 100 percent?
A Yes. The other thing you have not taken into [157] consideration is that this transaction is generating at $61 a share a cash flow deficit of $1.4 million annually, which the company has to finance some way, which also has not been taken into consideration in this analysis.

This analysis is not meant to be an all-consuming type of analysis.

Q And that $1.4 million cash flow deficit, that is a cash flow deficit to the holding company?

A Yes.

Q Correct. But at the same time this is $2.8 million coming into the bank in undistributed earnings?

A That's correct.

Q That is now the holding company's earnings in the sense that the holding company now owns the whole bank?

A Yes, that's correct.

Q Now, you say that is based on the assumption that all borrowed funds will be used for this acquisition?

A Yes.

Q And is it fair to say that this analysis shows that after paying all the costs of using somebody else's money for this deal, there would still be a net positive financial result for the holding company at $61 a share?

A That's correct.

Q Now, suppose the company did not use borrowed funds. Suppose instead, it used its own money or it used money that its investors put into the company as opposed to going to [158] Citibank and borrowing the $4 million from Citibank, isn't it the case that if that is done, the return—you have put aside any $4 million in interest, do you not?

A At the holding company level, yes.

Q And you put aside the tax benefits, because you are not paying any interest, so you get no deduction?

A Yes, that's correct.

Q And you still have the same $2.8 million in undistributed income, correct?

A Yes.

Q And you still have the same $833,000 in dividends, correct?

A Yes.

Q And you add those two together, and you get $3.7 million, don't you?

A Yes.

Q So if the bank, if the holding company uses its own money or its investors' money instead of borrowing funds, the return to the holding company is $3.7 million on this acquisition, correct?

A Just to the holding company, yes.

Q At $61 a share?

A Yes.

Q And that's just in the first year, right?

A Yes.

[159] Q Now, in this memorandum, you made a recommendation to Mr. Beddow about the action the holding company should take, correct?

A Yes, I do.

Q You recommend that the holding company should go forward with this acquisition and should pay $40 per share, right?

A That was my recommendation, yes.

Q And you made that recommendation on June 11, 1986?

A Yes.

Q Now, in recommending that this acquisition be a top priority of the company, you had some other reasons in mind besides the simple financial consequences shown on this sheet, right?

A I'm not sure I understand the question. What reasons?

Q Didn't you think it would make the holding company more competitive to eliminate the minority shareholders;

A Yes. That was my overriding reason.

Q Explain that a little bit, please.

A Since I have been with the company, we have always had banks that have had minority interests. Over the years, when the holding company tried to do some-

thing that would benefit the whole group, there were times when banking officers would say that the effect would be a detriment to [160] their bank even though they understood it would benefit the whole group, and while in the past, it didn't make a difference because we were competing with independent banks, and the later part of the 80's, banks like Crestar, Signet and Sovran came into the area, acquired some of our major competitors and now own those banks 100 percent. I felt we were at a very definite disadvantage from an operating efficiency standpoint. That was my main reason to recommend that we acquire the minority interest.

Q Are you saying, Mr. Scoffone, that in your view the officers of the subsidiary banks would seize on the existence of the minority shareholders as an excuse to resist change?

A Yes, that's correct.

Q You saw the elimination of the minority interests as in effect an elimination of that opportunity to resist change?

A Yes, you might say that, yes.

Q And that would make the holding company more competitive against Signet and other banks in the area?

A When you say the holding company when I refer to the holding company I not only mean the parent company but also all of its underlying subsidiaries, the company as a whole.

Q The company as a whole would be more competitive?

A Yes.

[161] Q And by the company you mean First American Bankshares, Inc.?

A And First American Bank of Virginia and First American Bank of Washington and First American Bank of Maryland, yes.

Q The holding company and all that it holds?

A Yes, that's correct.

Q And by more competitive, you mean more profitable?

A That's one aspect of it, yes. It's not the total aspect of it, no.

Q So you saw that there were very substantial benefits to the company from this acquisition even beyond the numbers reflected on Exhibit D, that that was part of the story but there were more benefits, right? As far as you were concerned?

A I felt like there were some disadvantages if we didn't go ahead with this project and that we could lose market share and the company could be hurt by its competitors.

Q So you would be disadvantaged if you didn't do it and conversely you would be advantaged if you did do it?

A Yes, that's correct.

• • • •

[162] Q Now, we talked about the two possibilities of financing this acquisition, one by borrowing the money, and one by using the holding company's money or the investors' money, right?

A Yes. You discussed that.

Q Were the funds borrowed for this acquisition?

A No, they were not.

Q You used the holding company money or the investors' money?

A Yes, that's correct?

Q Some time after this June 11 memo, the whole company in fact moved forward with respect to this acquisition, didn't it?

MR. CAWLEY: I'm sorry. Would you repeat that question?

BY MR. MERNICK:

Q Some time after this June 11 memo that you drafted and submitted to Mr. Beddow, the holding com-

pany moved forward [163] with this acquisition, process, didn't it?

A I am not sure what you mean by forward. There were things taking place during that time. Can you be more specific?

Q Was a decision made to go ahead with this acquisition?

A Sometime in '86, yes, that's correct. How soon after my memo, I couldn't speak to that.

Q Well, after your February 10th memo between then and June, nothing was done, was it?

A No decisions were made, yes.

Q Now, after your June 11 memo, in fact a decision was made to hire Keefe, Bruyette & Woods, correct?

A Yes, that is correct.

Q Did you attend the holding company's executive committee meeting of July 17th?

A I don't believe I did, no. I don't usually attend executive committee meetings.

Q Were you told that at that June 17, 1987 meeting of the holding company, the decision was made to go forward with this acquisition of the Virginia Bank?

A I probably was, yes.

Q You had worked previously with Keefe, Bruyette on other deals?

A Yes, I had.

[164] Q How many deals?

A I don't recall.

Q Can you approximate for me?

A We have had other deals with Keefe, Bruyette other than this type of deal. I can't say. Two or three, three maybe. I just don't know.

Q Have you worked with Mr. Michael Connor on those deals?

A I believe I have, yes.

Q Have you worked with John Boyle on those deals?

A No, I believe I did not.

Q Did you work with John Boyle and Keefe, Bruyette in connection with this Virginia Bank acquisition?

A Yes, I have.

Q Now, you and Mr. Beddow met the representative of Keefe, Bruyette to discuss this acquisition, did you not?

A Yes, we did.

Q You did that at the holding company's office here in Washington or in New York?

A In Washington.

Q And is it your recollection that that first meeting between you and Mr. Beddow and Keefe, Bruyette took place on December 2, 1986?

A If that was the date. I just don't recall. That sounds about the right time frame.

[165] Q Were both Mr. Connor and Mr. Boyle present for that meeting?

A I believe they were, yes.

Q And this was your first meeting with them to discuss this transaction, right?

A As far as I can recall, yes.

Q And was it also Mr. Beddow's first meeting with Keefe, Bruyette to discuss the transaction?

A As far as I recall, yes, but I can't say definitely.

Q Now, prior to that meeting on December 2nd, Mr. Beddow had told you, hadn't he, that he had in mind a price range of around $40 per share that he wanted to pay for this minority stock, didn't he?

A I don't believe he did, but—

Q Do you recall having your deposition taken in this case several months ago?

A Yes.

Q Do you recall being asked the following questions and giving the following on page 42 of your deposition: "Well, do you have a recollection, sir, that Mr. Beddow told you some price but you just don't remember?" Answer: "He might have, yes. I have a recollection that

he might have given me a range, price range but the specific price, no."

Question: "Do you have any recollection as to whether the range Mr. Beddow discussed with you bore any [166] relation to your recommended price as of June 11 of $40 per share?"

Answer: "That would seem to be around what we were all thinking about, yes, the $40 price. I recall that it was generally around that price range."

A You asked me if it was prior to the meeting, and I just don't recall whether it was prior to the meeting. We did discuss a price range roughly of $40. Whether it was prior to that meeting, I just can't, I don't remember. If I said it in the deposition, then I must have thought that at the time, but I just don't recall.

Q Did Mr. Beddow tell Keefe, Bruyette that he had that $40 price range in mind?

A Not to my knowledge.

Q Did you tell them that either you had it in mind or he had it in mind?

A No, I did not.

Q Is it your testimony, Mr. Scoffone, that Keefe, Bruyette was to come with a suggested price, that that was their job and that nobody from the holding company ever mentioned to them a suggested price or price that the holding company had in mind until after Keefe, Bruyette finished its analysis?

A It was my understanding that was the strategy, yes.

Q And is that in fact what happened?

[167] A As far as I am aware of, that is exactly what happened.

Q Now, at the December 2nd meeting you and Mr. Beddow gave information to Mr. Connor and to Mr. Boyle about the Virginia Bank, didn't you?

A Yes, I believe we did.

Q And you made it clear that if they needed more information, they could contact you and you could get it if it was within your power to do so?

A Yes, that's correct.

Q At the time of this acquisition, Mr. Milton Drewer was the president and CEO of the Virginia Bank, wasn't he?

A Yes, he was.

Q During that December 2nd meeting, do you recall telling Mr. Connor and Mr. Boyle from Keefe, Bruyette that the board of directors of the Virginia Bank was loyal to the bank and loyal to Milton Drewer?

A I didn't hear the first part of that question. I'm sorry. Did I say that or—

Q Did you or Mr. Beddow say to the Keefe, Bruyette gentlemen that the board of Virginia Bank was loyal to the bank and loyal to Mr. Drewer?

A I did not say it. What Mr. Beddow said I can't recall.

Q You can't recall if that came up—

[168] A I don't recall.

Q Do you recall whether a statement was made by either you or Mr. Beddow at this meeting to the Keefe representatives that all of the members of the board were customers of the bank, either individually or through their companies?

A I would not have said that to them. I would not have said it. I don't recall whether Mr. Beddow did or not.

* * * *

[170] Q Mr. Scoffone, if you would, turn to Exhibit K in that notebook. Now, Exhibit K, has four separate sheets of paper. I am going to ask you to turn to what is the second one in line. It's a handwritten note. At the top it says 1978 proxy and on the bottom right corner, it has the number 0191.

Do you have that before you?

A Yes, I do.

Q Are these your notes in handwriting?

A Yes, they are.

Q Did you prepare them while employed by First American Bankshares, Inc.?

A Yes, I did.

Q Do they relate to the acquisition of the Virginia Bank?

[171] A Yes, they do.

* * * *

Q Mr. Scoffone, were these notes taken at the December 2nd meeting with Keefe, Bruyette?

A They could have, but I couldn't say, sir.

Q You don't recall specifically when you took these notes?

A No, I do not.

Q Do you recall in your meeting with Keefe, Bruyette discussing topics of dissenters' rights?

A I am not sure. It might have come up during the [172] meeting, yes. I just couldn't say specifically.

Q Do you recall discussing with Keefe, Bruyette the topic of building projects and its effect on earnings?

A I believe it did come up in the meeting but what exactly it means, I am not sure.

Q Did you discuss with Keefe, Bruyette either topics of the dissenters' litigation, Court—amortization, the pension plan, the purchases of the Maryland Banks since 1984, the purchases of the Virginia Banks since 1984, and the assessment values of the real estate and securities? Were those matters discussed with Keefe?

A I believe they came up and these were questions that Keefe, Bruyette would have asked. They were just notes to myself.

Q Does that lead you to conclude that you made these notes at that second meeting of December.

A It would lead me to that but I couldn't speak to that specifically. It may be notes made right after the meeting. I just don't recall.

Q Do you remember what you meant by entry number 1 there "Dissenters' rights," paren, "No dissenters' rights?"

A Just that, that under Virginia law, there are no dissenters' rights in a minority buyout.

Q Who were the dissenters to which the note refers?

A If there were any dissenters to the buyout, it [173] would be the minority stockholders.

Q The minority shareholders, who didn't want the acquiistion to go forward or who didn't like price?

A Yes. That's correct.

* * * *

Q Are those dissenters to whom you referred?

A Yes. That's correct.

Q You discussed with Keefe the fact that in Virginia as far as you know those dissenters had no statutory rights, is that right?

A I believe it came up at the meeting, yes.

Q Now, Keefe, Bruyette came to Washington for a second meeting on January 9th, didn't they?

[174] A Yes, that's correct.

Q And that meeting took place at the offices of Clifford and Warneke?

A Yes, that's correct.

Q Did you attend that meeting?

A Yes, I did.

Q Was Mr. Clifford there?

A Yes, he was.

Q Mr. Altman?

A Yes, he was.

Q Beddow?

A Yes, he was.

Q Mr. Connor from Keefe, Bruyette?

A Yes, he was.

Q Mr. Boyle come down for that meeting?

A I am not sure whether John was at that meeting or not.

Q At that meeting Keefe gave its view on the price to be paid for the minority stock?

A Yes, that's correct.

Q It had completed its analysis by then?
A As far as I am aware, they did.
Q And it recommended $42 per share?
A Yes, that's correct.
Q Is that the first time you ever heard the $42 [175] number?
A That day was the first time. Whether I heard about it earlier that day when we walked over to Clifford & Warneke or I heard it at the meeting, I can't say specifically.
Q Do you still have Exhibit K-1 in front of you?
A Yes, I do.
Q Let's look at the bottom half of that one, please. Do you see where it says steps?
A Yes.
Q You see step No. 1, KBW and FAB and CAW meeting. Does that mean Keefe, Bruyette & Woods and First American Bankshares, Inc. and Clifford & Warneke meeting?
A Yes, it does.
Q That was going to be step 1 in the process, correct?
A Yes.
Q And step No. 2, CMC and MLD meeting, does that mean Clark M. Clifford and Milton L. Drewer have a meeting?
A Yes.
Q That was going to be step No. 2 in the process, correct?
A Yes.
Q And entry number 3, FABI informs FAB, Virginia board, that means the holding company informs the Virginia board of this proposed transaction, right?
A Yes, that's correct.
[176] Q And then entry number 4 is FAB, Virginia establishes committee. That means the board in Virginia Bank establishes a committee to examine this offer. Is that right?
A Yes. That's what that would mean.

Q That was going to be the fourth step in this process?
A Yes.
Q Now, if you look back at No. 2, it says after the entry, Clark Clifford, Milton Drewer meeting, discuss price of $42. Go to $45. Do you see that?
A Yes.
Q Doesn't that reflect step 2 in the plan was, Mr. Clifford would start at the $42 price with Mr. Drewer and go to $45, in that initial meeting?
A No, not at all.
Q That's not what it means?
A No.
Q What does it mean?
A That was just my personal musings at the time that when I heard the price of $42, that I would possibly go to $45 to do this deal to make sure it didn't fall apart.
Q Your personal musings?
A Yes, that's correct.
Q Had you discussed any of these steps with Mr. Beddow?
[177] A I believe I did. But when and what, I just specifically couldn't say.
Q You discussed with Mr. Beddow the fact that there would be a meeting between Keefe, Bruyette and the holding company and Clifford & Warneke?
A Yes, that's correct.
Q Did you discuss with him the fact Mr. Clifford and Mr. Drewer were going to have a meeting?
A Possibly, yes.
Q Did you discuss with him the fact the holding company would tell the Virginia board about this acquisition?
A Yes.
Q And did you discuss with him the fact that the Virginia board would establish some committee to examine this transaction?
A That was one of the possibilities, yes.
Q Did you discuss with Mr. Beddow your personal musings of starting at $42 and going to $45?
A I don't believe I did, no.

Q You kept that one to yourself?
A Yes, that's correct.
Q Mr. Scoffone, how did you know on December 2nd that Keefe, Bruyette was going to say $42 was the price?
A I didn't.
Q Why is it here in the December 2nd notes?
[178] A This piece of paper was in a folder that I carried around when we would have discussions and I would jot notes down on pieces of paper. This does not mean I wrote this down on December 2nd. It could have been any time.
Q So these are notes from two different occasions?
A It could be, yes.
Q Is there any entry on these notes that indicates that it's from more than one meeting?
A No, it does not.
Q Do you specifically remember as you sit here today that it's from more than one meeting?
A I can't say that. I can't also say that it wasn't two meetings or three meetings.
Q As you sit here today do you specifically remember the occasion on which you wrote steps 1, 2, 3 and 4?
A No, I do not.
Q Mr. Scoffone, what led you to muse that the holding company should start or Mr. Clifford should start with $42 and go to $45 in his meeting with Mr. Drewer?
A I don't believe I mused that Mr. Clifford should start at $42 and go to $45. I just thought to myself if I was doing this thing that I would go as high as $45 to make sure that the deal got consummated.
Q Why?
A Because I thought it was a very important priority [179] of the company. I stated so in my memos.
Q Do you know whether or not in the course of this transaction, the holding company was ever asked to go higher than $42 by the Virginia Bank?
A That I do not know, no.
Q Mr. Scoffone, turn if you would still within Exhibit K to what is the fourth of the pages; it has the number

1096 in the lower right corner. It says, "FAB/Virginia acquisition" at the top.
A Yes.
Q Do you have that?
A Yes.
Q Does it say strategy, KBW $42 at the top?
A Yes.
Q Are these your handwritten notes?
A Yes, they are.
Q Did you prepare them while you were employed by First American Bankshares, Inc.?
A I did, yes.
Q Do they relate to the acquisition of the Virginia Bank?
A They do.
MR. MERNICK: Your Honor, we would move the admission of this document as Plaintiff's Exhibit K-2.
THE COURT: Be received in evidence.

[180] (Plaintiff's Exhibit K-2 was received in evidence.)

BY MR. MERNICK:

Q Could you read that entry that is under KBW?
A It says number 1, letter from KBW, January 12, 1987, and number 2 documentation, 1-16-87; 3, Drewer meeting, 11:00 a.m., 1-13-87; 4, Drewer to board, 1-16-87. Decision by board 2-12-87.
Q The first, letter from KBW, 1-12-87, that is the Keefe, Bruyette fairness opinion?
A Yes.
Q Do you remember when you took these notes or when you made these notations?
A I don't remember, no.
Q Was it at that January 9th meeting with Keefe, Bruyette?
A It could have been but I am not sure. It could have been after the meeting.

Q Shortly after that meeting?

A Yes, possibly.

Q There was the timetable to be followed in connection with this acquisition, was it not?

A Not necessarily. I do know that on the 12th we were supposed to get the letter from KBW and the documentation would be ready on the 16th and that Mr. Clifford was going to [181] meet on the 13th. I think it was just speculation that Mr. Drewer would go to the board on January 16th because it possibly was a board meeting date and the decision by the board on 2-12 might have been another board meeting date.

Q And you did in fact receive a Keefe, Bruyette letter on January 12, did you not?

A I did not receive it, but I assume it did come to the company.

Q The holding company received it?

A Yes.

Q What was the documentation the holding company was to receive on the 16th?

A I don't believe that we would receive any documentation. I just believe that all their files would be ready at that time. But again I am speculating that that is what that means.

Q And there was in fact a meeting beween Mr. Drewer and Mr. Clifford on the 13th of January, wasn't there?

A I don't know whether there was or not. If there was, then there was.

Q And there was a board meeting of the Virginia Bank board to consider this merger in fact on January 15th rather than 16th, is that right?

A I don't know whether it was the 15th or 16th.

Q Do you know whether or not the board of the Virginia [182] Bank made its decision in its February 12, 1987 meeting?

A I don't know that, no.

Q Mr. Scoffone, turn if you would back to Exhibit J in the notebook. Do you have that before you?

A Yes, I do.

Q What is this document?

A It's a memorandum from myself to Robert G. Stevens and Jack Beddow regarding the acquisition of the Virginia minority interest.

Q Did you draft this memo?

A Yes, I did.

Q While you were employed by First American Bankshares, Inc.?

A Yes, I did.

Q Does it relate to the acquisition of the Virginia Bank?

A Yes, it does.

Q Does the same hold true for the second page of this memo, the chart with the heading, "Assumption 100 percent acquisition"?

A Yes, that's correct.

MR. MERNICK: Your Honor, we would move the admission of Plaintiff's Exhibit J into evidence.

MR. CAWLEY: No objection.

THE COURT: Be received in evidence.

* * * *

[185] Q Mr. Scoffone, you took your copy of this memorandum, this Exhibit J, into the January 9th meeting with Keefe, Bruyette at Clifford & Warneke, didn't you?

A Yes, I did.

Q You were asked to perform—let me back up—the second page of this document is the same kind of financial analysis of the consequences to the holding company of buying [186] up the minority interests as the Exhibit D that we looked at a few moments ago, right?

A Yes, that's correct.

Q Same type of analysis except now you are using different hypothetical purchase prices, right?

A That's correct.

Q And you were asked by Mr. Stevens and or Mr. Beddow to perform this analysis?

A Yes, that's correct.

Q Two days before Keefe, Bruyette was coming in with their price, is that right?

A Yes, that's correct.

Q You carried this memo into the meeting with Keefe, Bruyette. Is that your handwriting at the top right corner of the second page where it says, "Offering Price Range $42 to $45"?

A Yes, that's correct.

Q You wrote that at the meeting with Keefe, Bruyette on the 9th?

A Yes.

Q Who said at that meeting the offering price range should be $42 to $45?

A Nobody said that.

Q Mr. Conner didn't say that?

A Not to my knowledge.

[187] Q No one else from Keefe, Bruyette said that?

A No.

Q No one from the holding company said that?

A Not to my knowledge.

Q But you wrote down offering price range $42 to $45?

A Yes, I did.

Q Musing again?

A Yes, I was.

Q Turn back, pleace, to Exhibit K. If you would turn to the third page, the third page in my notebook, it says at the top, in the center, "FAB/VA," and the first entry says old budget. Do you have that before you?

A Yes, I have that. I do.

Q Were those your handwritten notes?

A Yes, they are.

Q Did you write those notes while you were employed by First American Bankshares, Inc.?

A Yes, I did.

Q Did they relate to the acquisition of the Virginia Bank?

A Yes, they do.

MR. MERNICK: Your Honor, we would move this document into evidence, Plaintiff's Exhibit K-3.

MR. CAWLEY: No objection.

THE COURT: Be received in evidence.

[188] (Plaintiff's Exhibit K-3 was received in evidence.)

MR. MERNICK: Thank you.

BY MR. MERNICK:

Q Mr. Scoffone, the lower half of this document, you see in the left margin it says "Altman numbers."

A Yes, I do.

Q And next to it it says, "Earnings per share, $4.52."

A Yes, I do.

Q The says, "Price, $44."

A Yes.

Q And "PE 9.7 X." Do you see that?

A Yes.

Q Does PE stand for price earnings ratio?

A Yes, it does.

Q And 9.7 X means the price earnings ratio where the price is 9.7 times the annual earnings?

A That's correct.

Q When did Mr. Altman tell you that he favored a price of $44 and a price earnings ratio of 9.7—

MR. CAWLEY: I object to that, Your Honor. He didn't say that, Your Honor. He read some handwritten notes there. He didn't say Mr. Altman ever said anything about $44.

THE COURT: I think if he didn't tell the witness that, he can handle that in his answer.

[189] BY MR. MERNICK:

Q When did Mr. Altman tell you that he favored a $44 price?

A Mr. Altman never told me that he favored the $44 price.

Q When did somebody else tell you Mr. Altman favored a $44 price?

A To my knowledge, nobody ever told me that Mr. Altman favored a $44 price.

Q What led you to write, "Altman numbers price $44"?

A I believe that was my shorthand for these would be numbers to be given to Mr. Altman at these calculations.

Q So these were your numbers to give to Mr. Altman and not his numbers?

A Yes, that's correct.

Q Mr. Scoffone, turn if you would to the last of these four notes under Exhibit K. It has very little on the page and it has got the number 0068 in the lower right corner.

A I'm sorry. I'm not sure I know—

Q It's—I'm sorry. The first.

A The first.

Q Yes. I misspoke. I'm sorry. Do you have that in front of you?

A Yes, I do.

Q Are those your notes?

[190] A Yes, they are.

Q Did you write them while employed by First American Bankshares, Inc.?

A Yes.

Q Do they relate to the acquisition of Virginia Bank?

A Yes, they do.

• • • •

[191] Q Mr. Scoffone, I have just a few more questions. You testified a bit earlier that neither you nor

Mr. Beddow [192] ever told Keefe, Bruyette the price that the holding company wanted to pay before Keefe, Bruyette did its analysis, is that right?

A I believe I testified that I never told them and I don't think Mr. Beddow ever did to my knowledge.

Q Sir, it's your view, is it not, that it would have been improper for you to have told Keefe, Bruyette the price the holding company wanted to pay, isn't that right?

MR. CAWLEY: Your Honor, I am going to object. May I approach the Bench?

THE COURT: Is it really necessary? We are spending a lot of time at the Bench.

MR. CAWLEY: I am not going to abuse it, Your Honor.

THE COURT: All right.

(Whereupon, a conference was held at the Bench with Court and counsel, out of hearing of the jury, and reported as follows:)

MR. CAWLEY: I think this testimony is going to be he is going to try to elicit from Mr. Scoffone his own personal view as to whether one should ever mention the price before going to an investment banker. I don't know what kind of expertise he is calling upon Mr. Scoffone to render but I think it's improper. I don't understand how it's probative of anything other than a person's own view. He is not a managing officer of the company. He is the chief accounting [193] officer of the company. He is not an investment banker. What difference does it make what his own view is whether it's proper or improper and what does it mean by proper or improper?

THE COURT: Objection overruled.

(Whereupon, the conference at the Bench was concluded, and the following proceedings were held:)

BY MR. MERNICK:

Q Mr. Scoffone, it's your view, is it not, that this would have been improper for either you or Mr. Beddow

to have told Keefe, Bruyette & Woods the figure that the holding company had in mind. Is that right?

A Yes, that's correct.

Q You would never tell an investment banker the price you wanted to pay because that could taint their analysis, right?

A I wouldn't use the word never. Never is an awful—

Q You would avoid telling them that because it would taint their analysis?

A Yes. In this particular acquisition, the strategy was to have Keefe, Bruyette render a fair value opinion and I was concerned that if they knew what our range was, that it might influence them. So that is why I used the term improper.

Q You didn't want to give Keefe, Bruyette a bias to [194] tell you, its clients, what you wanted to hear or what it thought you wanted to hear?

A Yes, that's correct.

Q You knew that at the time, right?

A Yes.

Q And do you know whether Mr. Beddow shared that view that it would have been improper? Did you ever discuss that with him?

A I believe Mr. Beddow did share that view.

Q That therefore makes you confident that Mr. Beddow would not have told Keefe, Bruyette the price they wanted to pay?

A That's correct.

MR. MERNICK: I have no more questions. Thank you, sir.

CROSS EXAMINATION

BY MR. CAWLEY:

Q You talked about it being improper for the holding company to tell Keefe, Bruyette the price it had in mind. Did the holding company have a price in mind when it met with Keefe, Bruyette?

A Not to my knowledge. Individual officers might have, but the company had not made a decision of what it was gong to pay.

Q Who called the shots at the holding company?

[195] A The executive committee and/or the board of directors.

Q What is the role of Mr. Clifford in these deliberations?

A Mr. Clifford is chairman of the board and I believe chairman of the executive committee.

Q Had he made a decision as to price?

MR. MERNICK: Objection. It calls for speculation, Your Honor. He testified he doesn't attend those meetings.

THE COURT: Objection overruled.

BY MR. CAWLEY:

Q Mr. Clifford had not made a decision as to what the price would be?

A To my knowledge, he had not.

Q Isn't that why they wanted to hire Keefe, Bruyette?

A Yes, that's correct.

Q Now, you said you are the treasurer and the chief accounting officer. Were you also the chief financial officer?

A At that time I was acting chief financial officer. I guess at this point I am still acting chief financial officer.

Q Are you involved with financial policy or with the accounting aspects of running the bank?

A More the accounting aspects of running the bank.

[196] Q So the financial policy matters would be handled someplace else?

A Yes. That's correct.

Q Now, one of the things that Mr. Mernick showed you was a document that had to do with certain ranges that you selected, certain analyses. I believe they were

Exhibits D and C. There was a February memo and a June memo, is that correct?

A Yes.

Q There were certain ranges there. Were those ranges of any significance to you in terms of potential prices?

A No, they were not. They were just ranges to give a non-financial person an idea of what the effect would be at those prices.

Q So you weren't telling the holding company they should pay $61 a share?

A No, I was not.

Q In fact the only recommendation you made in that June memo was to pay $40 a share, isn't that true?

A Yes, that's correct.

Q Now, in terms of cash flow, do those documents D and C show the cash flow effect of the merger according to the assumptions you made on those documents?

A Yes, they do.

Q Do they show a huge cash flow loss if the purchase [197] is made at either $40 or any price?

A Yes, that's correct.

Q Now, at the end, Mr. Mernick talked about the price of $61. You have already said that was just an arbitrary price?

A That's correct. It just came out to that at two times book. That's all.

Q Why were you picking arbitrary prices?

A As I said earlier, just to give somebody a feel for what the range would be. I could start it at A, which I thought was current market value, was the low point and B to Z, go all the way out to the range was two times book. I just wanted to give them an idea of what the effects would be.

Q You weren't suggesting that they should take your opinion as opposed to an investment banker's opinion?

A Absolutely not.

Q You don't hold yourself out as an expert in evaluating stock?

A No, I do not.

Q Getting back to those analyses, in the chart as we look down the chart, it shows a net income effect of $300,000 at the right-hand corner of one of the exhibits, is that correct?

A Yes, that's approximately correct.

Q Is that chart complete or are there additional [198] costs that were potentially payable by the holding company if the transaction went forward?

A Under those assumptions, assuming that we borrowed the money, we would have possibly incurred a capital problem where we would have had to have gone out and gotten additional capital which would have had an additional cost to somebody, probably our investors who would have to inject new capital into us.

Q Why should there have to be an additional capital expense? You say this is not listed on your sheet but it's an additional cost?

A Right.

Q Why would there possibly be an additional capital expense?

A It gets a little complicated, but the minority interest is counted as capital for regulatory purposes. If we borrowed money to buy out the minority interest, we would have converted that capital to a form of a borrowing, reduced our capital, at the same time by paying a price over book value. We would have incurred goodwill. The regulators require us for capital adequacy purposes to reduce our capital by the amount of goodwill. With all those factors, we would probably have had to put additional capital in to cover the loss of the minority interest capital plus the additional goodwill we would have paid.

[199] Q So the chart that Mr. Mernick asked you about that purportedly showed a net income effect was not necessarily the end of the story in terms of the costs to the bank or its investors?

A That's correct.

Q And he also asked you about the fact that instead of the bank or the holding company borrowing the money to make this acquisition, they could get money from the investors? Didn't he suggest that?

A Yes, he did.

Q In fact, there was a capital infusion from the investors?

A Yes, that's correct.

Q Wouldn't there be a cost to the investors?

A Yes, there would have been.

Q So either the bank borrows the money or it gets a capital infusion from the investors but there is a cost of money in either case, isn't that true?

A Yes, that's correct.

Q Now, why was Keefe, Bruyette hired? You talked a little bit about the hiring of Keefe, Bruyette.

A Keefe, Bruyette & Woods is a nationally recognized investment banking firm that has done many transactions as far as acquisitions of other banks, mergers, and we wanted to pick a firm that we knew would give us a fair value on the stock.

[200] Q Now, you have said that Keefe, Bruyette & Woods is a recognized investment banking firm and that you are not an investment banker. Do you know what effect if any even any mention by anybody of a price would have on an investment banker?

A I don't. You would have to ask Keefe, Bruyette & Woods whether them knowing what our range was or the officers' range was would have affected them. I don't know. I just didn't want to take that chance.

Q What involvement did you have with Keefe, Bruyette in this transaction?

A Outside of the December 2nd meeting, supplying them with some information that they requested, and the January 7th meeting, I don't believe I was involved with them at all.

Q Now, after the meeting on January 9th when a decision was made to offer $42, that decision was communicated to the Virginia directors, was it not?

A I believe it was, yes.

Q Did you have any contact with the Virginia directors during their period of deliberation?

A No, I did not.

Q You discussed the reasons why you personally would do this deal even at a higher price than $42?

A That's correct.

Q Do you personally have to bear some of the [201] bookkeeping and some of the regulatory burdens of having minority shareholders?

A To some extent, yes.

Q So is there a difference to you in terms of having minority than it would be to others?

A Yes, it would.

Q Now, with respect to the prices that we have been discussing, you have already told me that the chart that Exhibit D and Exhibit C that Mr. Mernick was showing you, that those don't show the complete picture because there could be an increased capital costs that aren't shown?

A That's correct.

Q But in fact would it make business sense to spend $45 million for a $300,000 return?

A No. On the contrary. It would not make business sense to do that.

Q What would be the return on investment, even assuming that there wasn't the additional cost you have alreay told us about?

A Well, $300,000 on a $45 million investment, that would calculate out slightly over a half a percent return.

Q Even at the $40 that you recommended in your June memo, what would be the return on investment?

A Around five percent.

Q Was this transaction done to make money, or was it [202] done to make the bank more efficient?

A It was done to make the bank more efficient.

Q You talked—Mr. Mernick asked you certain questions about a purported timetable. Was there any timetable that you knew of established by the holding company imposed on the local directors?

A Not to my knowledge.

MR. CAWLEY: I have no further questions. Thank you.

BY MR. STUMP:

Q Mr. Scoffone, as I understand it, the materials that you do have on your musings or your memoranda that you made, the numbers work only if the assumptions hold up. Is that correct?

A That's correct.

Q Now, is equity money available at 9.5 percent, if you know?

A I couldn't speak to that at all. That is not my field.

Q Did the Federal taxes continue to be at 46 percent level, or did that change after you made that memorandum?

A It changed, it dropped from 46 to 40, and that it's currently 34 percent.

Q So that would reduce whatever advantage there was to this transaction, would it not?

A Yes, that's correct.

[203] Q Turning to the memorandum that Mr. Mernick introduced as Exhibit C, what was the range of numbers which you presented for the consideration of the holding company at that time?

A They ranged at book, they started out at book value, 110 percent of book, 119 percent of book and then 125 percent of book.

Q In price numbers, that was from $29 to $36, was it not?

A Yes, that is correct.

Q Mr. Mernick—at those purchase price scenarios, $29 and $36, is it not a fact that a cash shortfall of between $3.2 million and $8.5 million would have been generated?

A I am not sure where you are getting your numbers, sir.

Q I am asking you to look to Mr. Mernick's Exhibit C.

A Oh, I'm sorry.

Q Page 358. That's page 2 of Exhibit C. I assume this is your memorandum, after the paragraph that follows the one that begins, "After the first Chicago debt repayment," and gives the conclusion as to what happens to the cash under the deals.

A Yes, that's correct.

Q What is correct is that a purchase price of between $29 and $36, the holding company generates a cash shortfall [204] of between $3.2 and $8.5 million?

A Yes, that is correct.

Q Mr. Mernick directed your attention to page 42 of your deposition in which you made a vague statement that Mr. Beddow at some time might have given you a price. Do you remember at page 42, line 1, having been asked by Mr. Mernick, "Well, prior to going into this meeting on December 2nd, had Mr. Beddow said anything to you as to what price he thought was the price the company should pay for the minority stock in First American?" and answering, "He never told me."

Mr. Mernick interrupted, "First American Bank of Virginia?" And your answer, "I am sorry. He never told me a specific price." Do you remember that?

A Yes, that's correct.

Q Is that true testimony?

A Yes, it is.

Q Do you have any recollection of Mr. Beddow ever giving such a price?

A No, I do not.

MR. STUMP: Thank you.

THE COURT: Any direct?

MR. MERNICK: It will be very brief, Your Honor.

[205] REDIRECT EXAMINATION

BY MR. MERNICK:

Q Mr. Scoffone, you responded to one of Mr. Cawley's questions by stating that you weren't telling the holding company to pay $61 a share, right?

A Yes, that's correct.

Q What you were telling them in that memo is if the holding company paid $61 a share, it would still make money, right?

A Yes, that's correct.

Q And Mr. Cawley elicited some testimony from you seeking to show that there were hidden costs that are not reflected on this schedule, is that right?

A That's correct.

Q Now, you prepared a number of these schedules over time, haven't you?

A Yes, that's correct.

Q And you have prepared them for your superiors at the holding company, right?

A Yes, that's correct.

Q Did you make a conscious effort to withhold this information about hidden costs from them?

A No, I did not.

Q Why don't they appear?

A Because the hidden costs at the time—at any point [206] in time you are not sure whether you are going to need additional capital or not because it depends upon your capital ratios at that point in time. Today I can't speak to whether we were over the capital ratios necessary or as required by the Federal Reserve back at that time or not.

Q So these so-called hidden costs would have been pure speculation at that point?

A Yes, that's correct.

• • • •

INTRODUCED DEPOSITION TESTIMONY OF ROBERT STEVENS

[211] "Q Are you an officer of Bankshares?

A Yes, I am.

Q Are you the president?

A Yes, I am the president of First American Bankshares.

Q Is the president the chief operating officer of Bankshares?

A I am the chief executive officer.

Q Is there an officer senior to you at Bankshares?

A Yes, the chairman.

Q Who is that, sir?

A Clark M. Clifford.

Q At some point in time did you become aware of the desire by Bankshares to acquire the minority stock in First American Bank of Virginia?

A Yes.

Q When was that?

A Well, I, from a personal point of view have been [212] interested in that since 1982.

Q What happened in 1982 that was the beginning of your interest in Bankshares acquiring the minority stock of First American Bank of Virginia?

A That's when I became president.

Q What was it that caused you to be interested in seeing Bankshares acquire the minority stock in First American Bank of Virginia?

A It is most unusual to have a bank holding company that does not own 100 percent of its banking subsidiaries.

Q I am going to show you, Mr. Stevens, a document that has previously been marked as Exhibit 6 in these proceedings. I am going to ask you if you have ever seen that before?

A Yes, I have seen this document.

Q Could you tell me where you saw this?

A Well, the document is dated June 11th, 1986 so I assume I must have seen it sometime around that date.

Q Do you remember from whom you received Exhibit 6?

A Vince Scoffone.

Q Did you discuss it with him on or about June 11th, 1986?

A I don't think I discussed it with Scoffone. I think we probably already talked about this in the executive committee.

Q Had you discussed the subject matter with [213] Mr. Scoffone prior to his writing this memo?

A Yes, but not this specifically. Mr. Scoffone and I have been talking about this since 1982. This was a standard format that I designed in 1982.

Q When you say it's a standard format.

A This schedule is something that I put together in 1982 and we just kept on periodically doing this kind of a piece, this kind of a piece of paper sometimes, you know, at random intervals.

Q So the record is clear, sir, when you say this schedule you are referring to the third page of Exhibit 6?

A That's correct.

Q Am I correct, sir, that you agreed with the summary stated on the second page of Exhibit 6, namely that the acquisition of the minority shares of First American Bank of Virginia should be a top priority item for the company?

A Yes."

MR. MERNICK: Mr. Hassett said in the deposition, "I am going to ask the Reporter to mark as Exhibit 12 a portion that has been produced by Bankshares of the minutes of the executive committee meeting of July 17th, 1986."

BY MR. MERNICK:

"Q Does Exhibit 12 refresh your recollection, sir, that there was some discussion of this subject matter at the executive committee on July 17th, 1986?

[214] A Right.

Q Tell me as best you recall what happened at that executive committee meeting?

A Well, by that time this matter had evolved to a point where we were in the process of creating the First American Metro Corporation and where I think it was being realized that minority shareholders at the bank level simply created burdens of equity that where it made sense that these people should be acquired. So at that point the time had come to take action on something that we had been deliberating on by this time for four years. You know, it was not a landmark kind of event. It was a culmination of an evolutionary process.

Q At the meeting did Mr. Altman express the viewpoint that he favored acquiring the minority interest in First American Bank of Virginia?

A Yes, he did.

Q Did you, sir, say the same?

A Indeed.

Q Did Mr. Beddow take the same position?

A That's right.

Q How about Mr. Clifford, what was his view?

A It was Mr. Clifford's view also that now is the time to act.

Q Is it your recollection, sir, that it was decided [215] by the executive committee that now is the time to act and Bankshares should proceed with acquiring the remaining 15 percent of shares in minority interests in First American Bank of Virginia?

A That's right.

Q Do you know, sir, why the last sentence of the minutes that we are looking at, Exhibit 12, indicates only that the executive committee should continue to consider whether and in what manner such an acquisition should be carried out?

A Well, at that time I guess we were speculating as to what a fair price would be and we simply didn't have all of the details about how we were going to do this. So this sentence I think just simply left the matter open.

It gave us a course of action but at the same time said we don't know everything we need to know today.

Q Was some process put in motion following the July 17th, 1986, executive committee to follow up on that decision?

A Either at this meeting or some subsequent meeting, Mr. Beddow was instructed to contact Keefe, Bruyette & Woods for an independent opinion as to the offering price, and also Mr. Beddow, I think, reviewed the legal process we needed to go through and whatever other arrangements that we needed to make in order to consummate this transaction. I guess my counsel says that I don't know what all those things [216] happened at this meeting but I think as I said either at this meeting or some subsequent meeting, those decisions were put in place.

Q Is it fair to say, sir, that either at this July meeting or at some subsequent meeting Mr. Beddow was in effect given the responsibility to proceed with all aspects of this transaction?

A That's correct.

Q Do you have a recollection of a meeting with Keefe, Bruyette & Woods respecting First American Bank of Virginia sometime prior to the January 9th meeting?

A I believe that I met with them sometime between July and January.

Q Do you remember who from Keefe, Bruyette & Woods you met with relating to First American Bank of Virginia in a meeting that took place sometime between July of 1986 and January of 1987?

A The fellow who handled this.

Q Was that Michael Connor?

A Yes. Connor.

Q Do you know who made the decision to hire Keefe, Bruyette?

A It was a consensus decision by the executive committee.

Q Do you know, sir, did Mr. Beddow give Keefe, [217] Bruyette their assignment on this project?

A Yes.

Q He told them what Bankshares intended to do?

A Yes.

Q Do you know what it was that he told them in that regard?

A He would have—

Q (Interposing) Excuse me. I don't want to interrupt your answer, but I notice you did start, 'He would have,' and I just want to be clear. What I am trying to ascertain is if you have any knowledge based upon either presence, when he did it or hearing a report from him or having someone else tell you. I want to know what your knowledge is. I am not asking you to speculate as to what he might have said.

A I can't really tell you whether I am speculating, whether I was at the meeting or whether Jack told me. I honestly don't know which of these three but we needed to sign somebody up to do a job like this. You have got to tell them what bank they want to look at and provide them with the financial information and so on.

Q Is it your understanding that Mr. Beddow did that?

A Yes, he did.

Q Do you have any understanding as to what particular assignment that he asked them to perform with that information?

[218] A Well, they would have known that we wanted to buy the minority in Virginia. We wanted to have an independent analysis done at a reasonable price to acquire this minority. So we sought the assistance of Keefe to do that. They do a great deal of this. They know a great deal about this banking industry. So we thought that it was appropriate from our point of view rather than just coming up with a price ourselves that we have some credence added to that opinion by some outside authority so that was why we hired an outside firm.

Q Now, sir, as of the July 1986 executive committee meeting that we have talked about previously, at which

there was a consensus that the minority should be acquired, did the executive committee have some idea of the price that it regarded as the price that it was prepared to pay?

A We always regarded book as fair price. In the history of the company when they had acquired shares that were offered to them typical price was book. When we had a rights offering when we needed to raise capital for our bank, those rights offerings had always been at book so it was just a question of whether we should pay book or we should pay something other than book but our baseline was very much book value.

Q At the executive committee in July 1986, did the committee have some consensus as to the price that it was [219] prepared to pay for the minority of First American Bank of Virginia?

A You put a date on that for me so I don't know whether some of this evolved on July 17th or whether it evolved over—it had come to some fruition before we went public with the offer. I can't give you a date as to when we did this.

Q Let me ask you this. Prior to asking Keefe, Bruyette & Woods to express any view as to price, did the executive committee of Bankshare have some view as to the price it was prepared to pay?

A Well, I think the numbers book was a strong point and a number like 40 was a fairly strong point and the actual price that we came out with, 42, was discussed.

Q When and by whom was that $42 price discussed?

A Well, it would have been discussed among the members of the executive committee.

Q Mr. Stevens, prior to the time that Keefe, Bruyette & Woods was asked to express their point of view as to price, there were some discussions, were there not, among members of the Bankshares executive committee as to the price Bankshares was prepared to pay?

A That is correct.

Q Could you tell me the gist of those discussions among the members of the executive committee of Bankshares?

[220] A Well, in this period of time in 1986 there had been some change in the price of bank stocks, some appreciation in bank stocks because of interstate banking had come up so that many bank stocks or most bank stocks' prices were substantially inflated because of this anticipation of interstate bank takeovers. So among things that we looked at and had been looking at in the past was what bank stocks had been selling for. So among the things that we thought about when you are acquiring the minority of a company that would never be sold was that we needed to take out the interstate takeover premium out of the current market, so that was among the things that we thought about.

Well, we thought book was a fair price to deal with the minority. We thought that we would give the minority some benefit of the doubt of a price somewhere between book since they were a profitable bank and while we thought that a realistic market rate was when you took out the takeover premiums. So we came up with the numbers like 40 and 42.

Q Were any other numbers discussed by the executive committee the numbers that Bankshares was prepared to pay prior to the time that you went to Keefe, Bruyette & Woods for an opinion?

A We had some difficulty in convincing Mr. Clifford that we should pay very much more than book because he thought very strongly that that was a fair price.

[221] Q Do you recall having any discussions with anyone in which the price of $44 was considered as a price Bankshares was prepared to pay?

A No. At best I can remember the conversations, it took a great deal of effort to get Mr. Clifford to believe that $42 was not unconscionably high. I do believe that we—."

MR. CAWLEY: Excuse me.

MR. MERNICK: It reads, "I don't—"
THE LAW CLERK: I'm sorry.
MR. MERNICK: "I don't believe"—line 22.
THE LAW CLERK: I'm sorry. "I don't believe that we ever took a concrete vote on a dollar matter, that that, as best I can remember, I believe that Mr. Clifford thought that it was actually in his hands but that if he had to, he would pay as much as $42 and he was perfectly in a position of being willing not to go ahead with the transaction, if it wasn't at a price that he was willing to live with."

BY MR. MERNICK:

Q Do you have any recollection, sir, of anyone else suggesting say for example the price of $44, as reflected on the third page of Exhibit 13, was the price that somebody within the Bankshares hierarchy believed should be paid?

A No. I don't believe there was anyone, anybody on the executive committee who took a stand for a number or touted a number. I don't know who did these notations on [222] memorandum, but they would only be just calculations to see what the numbers turned out to be. The numbers on the format as I told you earlier were simply numbers that we had used in a routine manner for a long time to look at these stocks.

Q Did you yourself, sir, in this period prior to obtaining the views of Keefe, Bruyette express a view to the executive committee as to what price you thought that Bankshares should pay for the minority stock?

A No, we were not. We did not go around the table saying what our prices ought to be or what anyone of us thought the price ought to be. Rather, it was a give-and-take discussion back and forth of what is book, you know, what does this number look like, what does that number look like so that it was just a general discussion among the members of the executive committee to finally reach some kind of consensus.

Q Was some consensus reached prior to getting the views of Keefe, Bruyette & Woods that $42 was the price that Bankshares would pay?

A As best I can remember, we did have $40 and $42 in mind as the number.

Q There was some consensus among the committee members on those two numbers?

A That's maybe even a little stronger than perhaps their conclusion was. I think that at that point you could [223] say that Mr. Clifford thought $40 to $42 was probably a reasonable range.

Q Is it fair to say that if Mr. Clifford thought that, the committee thought that?

A That's right.

Q Now, sir, do you know if when Mr. Beddow gave Keefe, Bruyette their assignment he told them that $40 to $42 was the range that Bankshares was prepared to pay?

A I don't know.

Q You never heard from him or from anybody else what he told them in that regard?

A I don't know what he told them in that regard.

Q Do you remember who attended the January 9th meeting?

A That was a meeting of the full executive committee.

Q Do you remember if Mr. Gillespie was on the executive committee at that time?

A I do not believe he was.

Q So it was Messrs. Clifford, Altman, Beddow and yourself?

A That's right.

Q Do you remember who was there for Keefe, Bruyette & Woods?

A To the best of my knowledge, it would have been Connor and Boyle.

[224] Q Do you remember what Keefe, Bruyette & Woods told you on January 9th in that regard?

A Other than a lot of filler around it, they didn't tell us very much more than they think $42 a share is a reasonable price.

Q Do you remember if they discussed with you any range of numbers that they considered to be reasonable prices?

A No, I can't say that I do.

Q Do you have any other recollection of what took place at that meeting?

A No, other than to come back and piece things together but at some point we had to make a decision. We were going to run with $42 and I don't know whether that was on January 9th or some date after that, but at some point we had to decide. We had to finally decide that that's what we would go public with.

Q Do you remember whether there was any discussion at the January 9th meeting of any dollar amount other than $42?

A No. Part of the gist of the discussions that took place at the meeting or in that time period was the reaction of Mr. Drewer to our proposed price and to his board of directors and in part, we were looking at those people not really as directors nor Mr. Drewer as the chief executive officer of our bank but in some ways recognizing them as [225] being substantial shareholders. We thought if those people responded favorably to our proposal, then the other shareholders would respond favorably to that price and these people hold as best I remember something like about 10 percent of the minority. It was decided that as a first step, Mr. Clifford would have a discussion with Mr. Drewer, and I personally don't know at this time whether Mr. Clifford was going to suggest $40 to Mr. Drewer or whether he was going to suggest $42. Actually, I don't know which he did, because I wasn't at the meeting.

Q Well, did you participate in any discussion prior to Mr. Clifford's meeting with Mr. Drewer with respect to what it was Mr. Clifford was going to say to Mr. Drewer?

A No. Mr. Clifford discussed with the executive committee the steps that we should go, that we should now go through in order to consummate this transaction. We went through this process where Mr. Clifford typically asked for suggestions and he asked for suggestions and he listens and we come up with a decision or process that we go through. The process that we decided upon as step 1 was to talk to Mr. Drewer, and tell him that this was not only—and at this point I don't think I know whether Mr. Clifford was thinking $40 or $42—that we thought that that was a reasonable price. And then at some point we also had an independent opinion that that was a reasonable price.

[226] Q Do you remember, sir, that at that meeting there was a consensus that Mr. Clifford would offer $42 and test the water with Mr. Drewer and that he would be prepared to go to $45 if the testing of the water so indicated?

A I believe that was at Mr. Clifford's discretion about what he would do, and I would be dumbfounded if he would have gone to $45."

MR. MERNICK: The Court's indulgence for a moment, please.

(Discussion among counsel off the record)

MR. MERNICK: Sir, would you read what appears at the top of page 63 of the transcript and insert the word "the" at the beginning of it.

THE LAW CLERK: All right. "The committee does not vote to give Mr. Clifford directions. Mr. Clifford essentially has the total responsibility for this company, and he seeks advice from the rest of us. But it would be at his discretion about whether or not he would do this. So we did not give him any directions as to say that he had the latitude to go any place he wanted to go."

BY MR. MERNICK:

"Q Do you remember any discussion with anyone before Mr. Clifford went to see Mr. Drewer what it might be desirable to say to Mr. Drewer in the event that he said, 'Gee, $42 is low?'

[227] A I believe that Mr. Clifford would probably have said that we were not interested in the transaction but we did not tell him that.

Q My question to you, sir, is simply whether you remember any discussion with anyone before Mr. Clifford went to see Mr. Drewer as to what it might be desirable for Mr. Clifford to say in the event Mr. Drewer said $42 was too low?

A No, I don't.

Q My question to you, sir, is whether you remember any discussions of the what-if character before Mr. Clifford went to see Mr. Drewer in which the what-if was, what if Drewer says $42 is low?

A I think the answer to that is no.

Q You say you think the answer is not. Give me your best recollection. Do you remember?

A My best recollection is that it is no, the answer is no, that there was not a case here, why Mr. Clifford was armed with the precise definition that if $42 didn't sound good to Mr. Drewer, that he would go to $45."

MR. CAWLEY: Excuse me, Your Honor. I believe the clerk misread just one word. "It's not a case of whether Mr. Clifford was armed with the precise definition."

THE COURT: I can't hear you, Mr. Cawley.

MR. CAWLEY: I'm sorry, Your Honor, for not standing.

[228] Your clerk read it as there was not a case here why Mr. Clifford was armed with the precise definition. The actual text is there was not a case here whether Mr. Clifford was armed with the precise definition.

THE LAW CLERK: That's true.

THE COURT: You want to pick that up again and read that again.

THE LAW CLERK: All right. "My best recollection is that it is no, the answer is no, that there was not a case here where Mr. Clifford was armed with a precise definition that if $42 didn't sound good to Mr. Drewer that he would go to $45."

BY MR. MERNICK:

"Q Insofar as you understood what was about to take place when Mr. Clifford went to see Mr. Drewer, if Mr. Drewer said, 'I think $42 is too low,' there would be no change made whatsoever in Bankshares' plans based upon that reaction?

A That would not be an unreasonable expectation.

Q Was that your expectation?

A I would say yes, that was probably my expectation, because I had precedence for it.

Q Do you have any recollection, sir, as to what your expectation was?

A I thought that Drewer would probably think this was pretty good.

[229] Q Do you know whether that meeting between Mr. Clifford and Mr. Drewer in fact took place?

A I was told that it took place.

Q Do you remember the report that you received with respect to that meeting?

A Well, I remember that I was told about the meeting. I don't remember who told me, nor when.

Q Just tell me what you remember if you were told?

A That the proposal was well received by Mr. Drewer.

Q I am simply referring—do you remember before lunch, Mr. Stevens, you testified that there was some conversation in which you participated in which the suggestion was made that Mr. Drewer himself owned some stock in the bank and that he was also friendly in some way with some other director who was thought to be quite a large stockholder. Do you remember that testimony?

A Yes, I do.

Q Did you ever hear any report back as to what the views were of that other stockholder?

A Not at that time. I did have a report on the board meeting of the Virginia board and some of the opinions that were expressed in that board meeting. I was not at that board meeting. I only had a second-hand report.

Q Who gave you that report?

A Well, it had to be Jack Beddow because he was the [230] only one there.

Q What as best you remember did Jack Beddow report to you about that meeting?

A That the proposal was well received by the board, that they thought it was long overdue that we made this proposal to acquire the minority shares, and that they thought the price was fair.

Q Do you remember anything else that was a part of that report?

A Well, in general, the proposal was so well received that evidently they had decided that they did not need another investment banker to take a look at it that those people felt that they had enough shares that they had a vested interest in it themselves and that they were seeing a price that they thought was fair and that they were ready to act.

Q Were any views specifically ascribed to Mr. Broyhill or Mr. Peterson in Mr. Beddow's report on the reaction of the board of the subsidiary bank?

A I am a little confused about what the name of the person is that had the most shares on the board. The recollection that I have is that Mr. Beddow reported that that person who did have this larger block of shares thought that this was a reasonable and fair price. In fact, whoever that person is, I had some contact with him some years [231] before in which he had stuck a needle into me that we should acquire these shares and that he would like to have his money out of this investment that he had.

Q It was Mr. Broyhill who at some time in the past had as you say stuck a needle into you that why don't you buy our stock?

A That's correct.

Q Now, sir, prior to your hearing the report as to the reaction of the board of First American Bank of Virginia, had it been your expectation that the First American Bank of Virginia would retain a financial adviser or investment banker to advise them as to the fairness of the offered price?

A We thought that they might do that.

Q Had you discussed that with anyone?

A That comment had come up at the executive committee meeting.

Q Who if any had expressed any viewpoint on that subject?

A It was just a comment at a meeting. I cannot attribute it to anyone.

Q Isn't that what you would have done had you been in a similar circumstance?

A I can give him an answer to the question this way. In January of either '83 or '84, we had merged all of the Virginia banks and we had come up with an exchange price for [232] each bank with the First American Bank of Virginia. There were none of the banks that had asked for independent banker advice on this exchange rate except for one out of six banks, I think.

Q To your knowledge, sir, was one of the services that Bankshares anticipated Keefe, Bruyette & Woods would perform when they were retained the making of a presentation to the directors or some group of the directors at First American Bank of Virginia with respect to the fairness of the price?

A Following past cases, we would have offered the comments from Keefe, Bruyette to the directors if they wanted to hear it. Well, I know that we would have been willing to have Keefe, Bruyette make a presentation to the board if they wanted to. I knew that in past cases

we had been willing to have our investment advisers make a presentation to the board and tell them why they had given us the opinion that they gave us.

* * * *

[234] Q Do you know, sir, who participated in preparing the proxy materials for First American Bank of Virginia with respect to their 1987 annual meeting?

A As best I know, they did this with their own staff.

Q As far as you know, there were no outside lawyers involved?

A They had outside counsel.

Q Do you know who that was, outside counsel with respect to the proxy statement?

A Yes, that's right.

Q Do you know who that was?

[235] A I don't know the names of that firm.

Q Was it the McGuire, Woods firm?

A That's right."

* * * *

TESTIMONY OF MILTON DREWER

DIRECT EXAMINATION

BY MR. HASSETT:

Q Mr. Drewer, you are the chairman and chief executive officer, are you, sir, of First American Bank of Virgina?

[236] A I am.

Q You were during 1986 and 1987?

A Yes.

* * * *

[239] Q Now, sir, as of the end of the year 1986, the beginning of the year 1987, it was your view, was it not, that your stock in the bank was worth between $40 and $45 per share?

[240] A In a general range, yes.

Q And that that would be—a fair price for your stock would be $40 to $45?

A Anywhere within that range was a price that I felt I could live with if we ever needed to, if they ever wanted to buy the stock, yes.

Q How did you arrive, sir, at that range of $40 to $45?

A Well, I took into consideration several things. I took into consideration the book value which at the end of 1986 was $33.30. I took into consideration the fact that our market price, which was shown every week in the Washington Post, as either $32 to $32.50. I took into consideration in addition to that that we did have a limited market out there. And in addition to that, I took into the market value of the real estate, and I added to that the market value of our real estate was somewhere in the range of $5 a share, and I would add that to the book value, which would make it around $38 a share, and then felt that there should be some premium, though not a great premium as a result because the control was already in the hands of the holding company.

Q Now, when you say, sir, that you felt there should be some premium, I understand you to say there was a reason why it shouldn't be a great premium, but what was your reason for thinking there should be some premium?

[241] A I just thought it would be a nice gesture on the part of the holding company to give us some premium and in recognition of good stockholders that we had had over the years.

Q Did your view that a fair price for your stock was $40 to $45 include the notion of a nice gesture by the holding company rather than something that you felt was in fact a value of the stock?

A Well, it's a very nebulous thing and it's very abstract and hard to put your hands on because actually when you don't have but 15 percent left, you know, you

don't have much to sell. So you don't really have anything to call on anybody to pay you a premium for.

* * * *

Q Mr. Drewer, you have told me that you added $33 book and $5 to $6 for the real estate and you got $38. That $38, sir, didn't include the value of the bank's very good relations with its customers, did it?

A No. And the good relations with the customer [242] wouldn't have affected it either way, regardless of the ownership of the stock.

* * * *

Q Mr. Drewer, that $38 didn't include the value of the fact that the First American Bank of Virginia was the dominant bank in the Northern Virginia market, did it?

A I think that's already been taken into consideration We were the strong bank. We did continue to improve. Whether you had 15 percent in a group of people's hands or whether it was all in one, I don't see how it's material to the buying of the stock.

Q You, sir, don't have any particular training in valuating bank stocks, do you, sir?

A No. I think I have some ability, along with our board of directors in determining the value of the stock of our particular bank, and I don't try to get into any other area.

Q At your deposition, Mr. Drewer, do you remember that [243] Mr. Stump made a point on the record of telling me that you had just admonished him that you were not trained in valuing bank stock; do you remember that?

A I said that. No, I am not trained in valuing bank stocks.

Q Very good. Now, sir, at the end of 1986 and the beginning of 1987, the holding company that we have been referring to owned 85 percent of the stock of the bank. Is that right?

A Yes.

Q And it owned it through a subsidiary called Virginia Bankshares?

A Yes.

Q And you know Jack Beddow?

A Yes.

Q He was an officer and director of the holding company?

A Yes.

Q He was a full-time employee of the holding company, wasn't he?

A Yes.

Q Was he also an officer and director of Virginia Bankshares?

A Yes.

Q Now, sir, did he call you on the 12th of January [244] 1987 and as kyou to come to a meeting the next day?

A Yes.

Q Did he tell you that meeting was because the holding company officials wanted to tell you about the holding company's plan to eliminate the minority stock ownership with your bank?

A He told me that Mr. Clifford wanted me to come to his office and meet with him and that, to get myself prepared as much as I could, that they wanted to discuss the buying of the minority interest.

Q That was the first time you had heard of that interest by the holding company?

A Yes.

Q And that meeting took place the next day in Mr. Clifford's office?

A Yes.

Q Who was there, sir, besides you and Mr. Clifford?

A Jack Beddow and Bob Altman.

Q And who is Bob Altman?

A Bob Altman is the president of one of the holding companies in Bankshares.

Q Is he president of one of the companies that is the company that owns the stock of the bank, sir?

A Yes.

Q And he is the director of the holding company, also?

[245] A Yes.

Q Now, at that meeting, did Mr. Clifford tell you that the holding company was going to acquire the minority interest in the bank?

A He told me that they were prepared to buy the minority interest of the stock and that he would like to set the process in motion and that he was proposing a price of $42 a share for the stock.

Q Did he tell you that the holding company intended to proceed with that transaction in the form of a merger?

A Yes. We did discuss the process that we would go through in consummating this.

Q What did he say in that regard, sir?

A My memory says that we discussed the process, that there would be a merger through a phantom-type corporation, and that it would culminate in the stock being bought, but before that could be done, it had to be approved by the board of directors of the First American Bank of Virginia and that we would have to go to the stockholders in order for their approval as well.

Q Did Mr. Clifford tell you he wanted the board to consider that approval at its February meeting?

A No, he did not.

Q Did he say anything about the time frame on this transaction?

[246] A Not so far as when it would be approved. He knew that we had a board meeting on the 15th, and we agreed that I would present it to our board at that time for them to take whatever action they deemed necessary.

Q Now, sir, in the discussion of this merger process, was it explained to you by Mr. Clifford at the meeting that the effect of the merger would be that the minority stockholders would be required to accept the cash price of $42? If your board had approved—

A (Interposing) I'm not sure that Mr. Clifford said that to me. That was my understanding of what would happen, yes. Whatever price that we agreed to.

Q And was it Mr. Beddow who told you that?

A I don't know.

Q Somebody told you that?

A That's right, or I knew it, one or the other.

* * * *

[247] Q Did you understand, sir, that it was your duty as one of the directors to represent the minority stockholders and see that they got a fair price?

A Oh, absolutely.

Q Now, sir, when Mr. Clifford told you about this intention of the holding company, did he tell you why the holding company wanted to eliminate the minority stockholders?

A I don't remember specifically what he told me with that regards, but he did say that he was interested in buying all the stock, yes, but I—nothing further.

Q Did you ask him why the holding company wanted to eliminate the minority?

A I doubt it. I think I knew why, it would be to the advantage of the holding company to own all of the minority stock.

Q Why was that, sir?

A Because it would indeed, as has been said here today, it would be more efficient for them. It would be more economical for them, and it would also mean that it would make them more competitive. What Mr. Scoffone said today about the holding companies around that had bought banks across State lines and that they had 100 percent of those banks, that they were at a competitive advantage to us; and I can understand why Mr. Clifford and the management at [248] Bankshares would not want to have to be concerned about one of the banks or ever minority stockholders if they wanted to do something and to know that somewhere along the line a minority stockholder might say no, I am not going to do it.

Q This is what you understood. It's not what Mr. Clifford told you?

A You asked me.

Q I am just trying to be clear in my own mind.

A Yes.

Q Now, sir, did Mr. Clifford at that meeting in his office on the 13th of January tell you that the holding company had gone out to an investment banking firm and asked the investment banking firm to on its own come up with what it thought would be a fair price?

A Yes. He told me that they had acquired the services of Keefe, Bruyette and that Keefe, Bruyette had come up with a price of $42 a share, and even though he thought it was too high, that he was going to go along with the recommendation of Keefe, Bruyette.

Q Now, sir, you understood, sir, that $42 a share, which would be $30 million for all of the minority stock, was not Mr. Clifford's money, did you not?

A Oh, sure.

Q You understood it belonged to these investors?

A I understood it was money coming from Bankshares. [249] Where that money came from, I didn't know. I knew that once they had the 15 percent, yes, the investors owned all the stock.

Q Did Mr. Clifford say to you why he would be prepared to pay a price that was higher than would be fair to those investors?

A I don't follow your question.

Q Did you tell me, sir, that Mr. Clifford said he thought $42 was high but he was willing to go along with it?

A Well, that was just his judgment, or at least that's what he told me, that it was his judgment that it was more than the stock was really worth.

Q I take it he didn't say anything to you as to why he would be willing to pay more than would be fair to require these investors to pay?

A Not to my knowledge.

Q And you didn't ask him about that?

A I don't remember asking him.

Q Now, sir, when Mr. Clifford—I take it nobody—withdraw that and ask you this, Mr. Drewer: nobody at that meeting at Mr. Clifford's office told you that Mr. Beddow had in fact suggested the $42 number to Keefe, Bruyette & Woods, did they?

A No.

Q Mr. Beddow was at that meeting?

[250] A The one in Mr. Clifford's office?

Q He was at the meeting—yes.

A Yes.

Q He was there when Mr. Clifford told you that Keefe, Bruyette & Woods had come up with that $42 all on their own?

A Yes.

Q And it continued to be your understanding, did it not, sir, down through the time your board approved the merger, that Keefe, Bruyette & Woods acted all on its own without any suggestion from the holding company had independently arrived at that $42?

A That was my understanding.

Q Continued to be so?

A Yes.

Q Right down until today?

A Yes.

Q Now, at that meeting in Mr. Clifford's office, did he say something to you about having obtained a fairness opinion?

A If he did, I don't remember.

Q Did he show you a fairness opinion?

A Define fairness opinion for me, if you will.

* * * *

[251] Q T, yes, sir, and go to the very end of it; and there is a two-page letter there. T is the proxy statement that you sent to the stockholders at your bank.

A Right.

Q You attached to the rear of it something from Keefe, Bruyette & Woods about a fairness opinion.

A Your question, I believe, was did I see this letter at the meeting with Mr. Clifford, and no, I did not.

Q No, you did not. Do you remember when you first saw this letter?

A I don't remember having seen this letter until the deposition with you.

[252] Q And that was sometime during this case, the last few months?

A Yes.

Q Now, sir, you are aware, are you, that this letter is attached to the proxy statement that you sent out to stockholders in March of 1987, asking them to approve this transaction?

A That's the official part of the—are you telling me that it was a part of the proxy statement.

Q Yes, sir, I am.

A Okay, then yes.

Q But you don't remember having seen it until I took your deposition in this case?

A Not as a specific thing, no.

Q You never specifically focused on it?

A No.

Q Do you know that this proxy statement, Exhibit T, makes a reference in the text to the receipt of the fairness opinion from Keefe, Bruyette & Woods?

A I know that now. When I read the proxy statement before I signed it, it did not register with me to the point of being something unusual. So I do not remember it as a specific item.

* * * *

[253] Q In view of the fact, Mr. Drewer, that you just testified that you never focused on the Keefe, Bruyette & Woods fairness opinion letter, attached to Exhibit T, until your deposition in this case, is it fair to say that at the board of directors' meetings when you were considering the [254] merger, you did not rely on the fairness opinion letter of Keefe, Bruyette & Woods?

A We did not rely on the letter itself, no. We relied on the figures that we received from them.

Q Very good, sir. Now, sir, when Mr. Clifford at the meeting in his office on the 13th of January told you that the holding company was going to pay, intending to pay a price of $42 did you tell them that you were delighted with that price?

A I told them that I thought it was a reasonable price, at first glance from my standpoint and with what study I had already done, or had done with our financial people and looking at it, but that I would have to go back to our board of directors and we would have to make a further study and get back to him in the near future.

Q So I take it you didn't say you were delighted with the $42?

A I don't know if I used the word delighted or not.

Q Well, did you say anything—

A I did not react negatively to the $42.

Q You told him you would have to go back and present it to your board and study it?

A Absolutely.

Q Now, sir, at that meeting in Mr. Clifford's office, did people at the holding company didn't show you their letter [255] by which they engaged Keefe, Bruyette & Woods to represent them, did they?

A No.

Q And they didn't tell you that that letter limited the people who could rely on Keefe, Bruyette's opinion to just people at the holding company, did they?

A Not to my knowledge.

Q Now, sir, they didn't tell you anything at that meeting in Mr. Clifford's office about the fee structure that Keefe, Bruyette & Woods had either, did they?

A No.

Q Isn't it true, sir, that neither you nor others on your board right down through the time that you ap-

proved this merger, knew anything about the Keefe, Bruyette & Woods fee structure?

A At least it didn't register with us. It was obviously there in the proxy statement which I reviewed and approved and signed, but it did not register with me to the point of being anything unusual.

Q Well, sir, isn't it true that as of the time that you approved the merger at your board on February 12th, you hadn't seen the proxy statement yet?

A That's true.

Q So isn't it true, sir, that as of the time you and your board approved the merger at $42, you didn't know [256] anything about the Keefe, Bruyette & Woods fee structure?

A That's true.

Q And it's true, also, that at the time you and your board approved the merger and the $42 price, you didn't know that the letter agreement between the holding company and Keefe, Bruyette & Woods said that nobody other than the holding company was to rely on the Keefe views?

A That's true.

Q Very good, sir. You never asked anybody at the holding company to show you that engagement letter between them and Keefe, Bruyette, did you?

A What we did was—

Q I'm sorry. Could you just tell me?

A No.

Q No, you never did. Thank you, sir.

Now, sir, when Mr. Clifford told you at this meeting about the $42 price, I take it you didn't suggest to him that you would be interested in hearing a higher price?

A I don't believe so.

Q Isn't it true, sir, that in fact you never negotiated with anybody from the holding company for a price higher than $42?

A The negotiating that we did—

Q Excuse me, sir. Isn't it true—

A We negotiated at the board meeting in the form of [257] our directors discussing with the holding company representative. It was Mr. Beddow.

Q Mr. Drewer, isn't it true that you, sir, you, the chairman and chief executive officer of the bank, never negotiated with anyone at the holding company for a higher price than $42?

A I think that's true.

* * * *

Q Mr. Drewer, at your deposition, didn't you also testify that you had no knowledge that there were any negotiations at all between the bank and the holding company with respect to the $42?

A I may have. I don't remember specifically.

Q Well, let me—

A But it's been made a part of testimony today that there was discussion.

[258] Q Mr. Drewer, I would like you to just tell me what you know, and not try to recapitulate what you may have heard somebody else say.

A I do know that Mr. Yeonas asked a specific question of Mr. Beddow, if he thought we could go any higher. I do remember that Dr. Johnson said something, but I don't remember what with regards to whether the price might be increased.

Q Now, Mr. Drewer, at pages 222 and 223 of your deposition, taken this May 17th, I asked you, "Now, it's true, sir, isn't it, that there were not negotiations as to the $42 price in this merger, were there?" And the answer which you give on page 223 was, "Initially, I did not negotiate with the holding company on the price."

And then I asked you, "And there weren't—

MR. STUMP: Do you want the entire answer if we are going to read part of the deposition?

MR. HASSETT: Sure.

BY MR. HASSETT:

Q You said, sir, "I did not negotiate with the holding company on the price. We analyzed all of the information that we had available and came to the conclusion that $42 was a fair price and on that assumption we accepted it."

And I asked, "And there weren't any negotiations with the holding company by anyone else on behalf of the bank?"

[259] Mr. Stump made an objection, and you answered the question—the question again was, "And there weren't any negotiations with the holding company by anyone else on behalf of the bank?" and you answered, "I do not believe so."

Do you remember giving that testimony?

A That's exactly what I said. And now I am saying that in addition that in thinking about it since then, I do remember the comment of Mr. Yeonas to Mr. Beddow.

Q You testified at your deposition about the comment Mr. Yeonas made to Mr. Beddow, didn't you, sir?

A I don't know.

Q You don't know?

* * * *

[262] Now, sir—(pause)—did you report to your board of directors on the 15th of January the substance of your conversation in Mr. Clifford's office attended by Messrs. Clifford, Altman and Beddow?

A Yes.

Q So far as you know, was that the first time that the directors on your board other than yourself and Mr. Beddow knew anything about this plan to eliminate the minority stockholders?

A Yes.

Q At your meeting, did Mr. Beddow describe to the other directors what the thinking of the holding company was [263] on this transaction?

A I don't remember him having done that. I made the explanation. We may have asked him for additional

information, but I don't remember anything specific that he said.

Q Now, sir, no documents were given to your directors on the 15th, were they, about the merger?

A I don't believe so. As you know from the deposition, I have had trouble with the exact meetings that I saw the figures from Keefe, Bruyette that we used the figures from Keefe, Bruyette, so I can only say what I think, and no, I don't think we had any figures on the 15th.

Q Did Mr. Beddow, sir, on the 15th explain how the merger transaction would work?

A I don't remember whether he explained it, I explained it, or one of our board members explained it for us. In all probability, there were several that had something to say about the process.

Q Mr. Drewer, at your deposition on page 96, I asked you, "Now, at the board meeting at the 15th of January, did you make a statement of some kind to the board with respect to the merger proposal?" And you said, "I told them of my meeting with Mr. Clifford and explained to the board as best I could what had transacted there and the steps that they had taken and explained what I thought the process was and that we would go thorugh the steps that would necessarily be taken. [264] Mr. Beddow followed up and went into some little detail about what the actual legal steps would be in this process. Because he is a lawyer, he understood it much better than I did."

A Then he must have done it. I remember it that way at the time.

Q Now, sir, isn't it true that at your meeting on the 15th of January of your board, there was no discussion as to whether eliminating the minority would be in the best interest of the bank?

A We had two—we had discussions on the issue at the full board meeting on the 15th, and then at the executive committee, which followed immediately there-

after, we discussed it again; and we discussed the issue on the 29th of January; and we discussed the issue on February 29th, which was an executive committee meeting. And we discussed the issue on February 12th. I think we covered the subject fully. In those four meetings, I think we covered the discussion fully.

Q My question to you, sir, was whether at the board of directors' meeting on January 15th, isn't it true that there was no discussion whatever as to whether eliminating the minority was in the best interests of the bank?

A I can't answer that either way because I don't remember.

Q Mr. Drewer, at page 101 of your deposition last May, I asked you, "Was there any discussion at the board of [265] directors' meeting on January 15th as to whether it was in the interests of First American Bank of Virginia to approve the merger?" and you answered, "No, I don't believe so."

Do you remember giving that testimony?

A No.

Q You don't remember giving that?

A No.

Q Does it refresh your recollection at all as to whether that subject was discussed at the board meeting?

A No.

Q Didn't some of the directors indicate to you at that board meeting that in fact they would prefer that there not be a merger?

A At one of the meetings, yes, there was a discussion as to the value of having minority stockholders; and there was a discussion as to whether we enjoyed being minority stockholders. There also was a discussion as to what was in the best interests of the bank and the legal issue which we go over—we have been over before, which says that if I understand the Virginia law, that there can be a merger. Our responsibility it seems to be was

to make sure that the price that we were receiving was going to be fair to the minority stockholders.

Q It is the case, is it not, sir, that some of the directors indicated to you on the 15th that they preferred [266] there not be a merger?

A I don't remember.

Q You don't remember that. Do you remember, sir, that at your deposition that I asked you at page 103 at the top of the page, "Did you learn at some time from members of the board that it was the sense of the board that they would have preferred not to sell all of the stock?

Answer: I can only give you an answer which is an opinion that I have on how the board of directors including myself felt. And that was that we would have preferred to continue having minority stockholders interest and that we individually and as a group would have preferred to own the stock that we had."

Is that testimony that you gave, sir?

A I don't think it's inconsistent with what I said.

Q That is your testimony?

A Yes.

Q Very good, sir.

MR. STUMP: Your Honor, it's not so good. It's not an inconsistency. It seems to be the witness should be able to point out as he was cut off from doing that there isn't anything inconsistent about it.

THE COURT: Objection overruled.

BY MR. HASSETT:

Q Was it your belief, sir, at the board of directors' [267] meeting on the 15th of January that if in fact the $42 price was fair, you and the other directors had no alternative but to approve the merger?

A Once we determined a fair price, what we felt a fair price was, yes, I felt that the consummation of the merger would take place.

Q And did you feel, sir, that you had no alternative but to approve it?

A We had no alternative as I see it as being the director with our responsibilities to get a fair price, and once we had a fair price, to approve it, yes.

Q And you believed, didn't you, sir, at that time that if you didn't approve it, that you could be removed and a board of directors would be put in place that would approve it?

A You are correct that we could have been removed.

Q Now, sir, as of that January 15th meeting, had you retained on behalf of the board or otherwise any outside lawyer to advise you on what the rights and responsibilities of the board were?

A I had not spoken to anyone prior to January 15th.

Q Isn't it true, sir, that the bank didn't retain any outside lawyer on this matter until after your board had already approved the merger?

A Following the—following the meeting of January [268] 29th when we met, and incidently at that meeting, we had our own inhouse counsel with us. She was at our meeting giving us advice with regard to this. And we did, after that time, I did tell her if she wanted to improve or get to work on the proxy that she could use, because it might be more involved since we probably would, if we went ahead with the approval at the board meeting, we would want to have the annual meeting and the stockholders' meeting to discuss the merger at the same time. And I did suggest to her that she might get McGuire, Woods & Battle to assist her in preparing the proxy statement.

Q Wasn't that, sir, after you had approved the merger on the 12th of February?

A I don't remember exactly.

Q Was there some discussion—excuse me—Mr. Broyhill was at that meeting on the 15th of January, was he?

A I don't remember whether Joel was there or not. We have a record here somewhere who said who was

present at the meetings. I do know, as we determined that the board voted to have the executive committee to be the committee, to consider the price and merger, that we decided to ask Mr. Broyhill to sit on the committee with us, because he was the largest stockholder on the board of directors. We wanted to make sure that we have his opinion in with the up front, [269] full discussion that we were having.

Q And he had expressed a view, hadn't he on the 15th, that he would be very pleased to sell his stock for $42?

A At this time I don't remember that happening.

Q I take it there was some discussion, was there, sir, at the January 15th meeting as to whether the board should hire a financial adviser expert in these matters to advise as to what the value of the minority stock was, is that right, sir?

A Yes, there was a discussion. It was left to the executive committee of—the first step, let me say, we asked if we might be able to interview Keefe, Bruyette, and Mr. Beddow said he thought he could arrange that for us if we were so inclined to do so. And so the board said that they would leave it to the executive committee to see if they felt that it was necessary to go outside and get another opinion. We were not going to rely but so much on the Keefe, Bruyette opinion anyhow. I relied much more strongly on our board of directors and felt that their expertise and their knowledge meant more to us in determining what was a fair price than Keefe, Bruyette.

Q Mr. Beddow said he could get Keefe, Bruyette down to speak to your group if you would like.

A He said he thought he could and he would let us know if he could arrange it.

[270] Q And he was able to arrange it, was he?

A Yes.

Q Now, in connecton with the discussion about whether to hire our own investment adviser, financial adviser, did Mr. Beddow tell the board that they had

an obligation not to be too over zealous, because they might cause the holding company to withdraw the offer?

A I don't believe so.

Q You don't believe so?

MR. HASSETT: If I may have the Court's indulgence a moment.

(Pause in the proceedings)

BY MR. HASSETT:

Q Was that view expressed at all around the table at the board meeting that day?

A What view?

Q The view that the board had a duty not to be over zealous, it might—

A No, I don't think that was the view at all. I felt and still feel that our board felt their responsibility very strongly and very strongly to the minority stockholders, to be sure that they were being fair and that it would be a fair and just price.

Q Sir, at your deposition in this case at page 52 and 53, I asked you what was the general discussion of the board [271] of directors on the subject, and your answer was, "Just as what the law was with regards to buying all of the stock of the merger process that we went through, our responsibility to be doubly sure that we got a fair price and that we had to take special consideration of the minority stockholders on both sides: one, that we get a fair price on the high side, that we could there but at the same time that we not be over zealous and that the deal might fall through, and that we might harm the stockholders who felt a real need to sell and thought that $42 was just that they wanted that price."

A I interpreted your over zealousness, if you will, as being something that our board was saying not be over zealous or we might make someone mad. That was not the case. The issue was to be sure that we got a fair price, and on the down side, it was, yes, $42 was what we thought was a fair price. And we might consider trying to get more, but as we did that, we had better take

into consideration the stockholder who needed to sell their stock. And we were having periodically and quite often people who were selling their stock and there were very few people, very few sales out there, very few people that wanted it; and these people who maybe because of an estate, because they had to sell the stock for any number of reasons, were having to sell their stock at $32 and $32.50 a share. So we had to look at both sides of this. Yes, it is fair, and yes, we might try to get more, [272] but boy, if they say no, then we may have upset an awful lot of people who want to sell their stock, because in our judgment, it would have taken ten years for that $32 stock in the market to have gotten to $42 a stock that we were being offered. That's my over zealousness that I was referring to.

* * * *

[273] Q "Now, sir, who articulated that description of the duty of the directors?"

"It can't be more specific than to say that I spoke to him. I am sure Mr. Beddow spoke to him and I have every confidence that Mr. Yeonas, Mr. Broyhill spoke to him. I have a very vocal board. It's hard to determine who didn't have something to say."

Does that refresh your recollection, sir, that you were sure at least as of May that Mr. Beddow was one who spoke.

A It surprises me that I would say Mr. Beddow because he was not at all vocal in this discussion. He in all probability was the least vocal of all of our directors as [274] we had this discussion so if I said it in June, I sure must have—or whenever it was—I sure must have remembered it that way. But as I look at it today, I don't remember that specifically.

* * * *

Q Now, sir, when the board was on the 15th of January talking about whether to hire its own adviser to tell it what the minority stock was worth, did Mr. Yeonas

ask [275] Mr. Beddow whether if the board got an opinion of its own adviser and that opinion said the stock was worth more than $42, the holding company would be prepared to pay an additional amount?

A The only thing that I remember that Mr. Yeonas asked was to the effect whether he thought the holding company would go any higher than $42, and my memory says that Mr. Beddow said he did not believe so. They hadn't in the past when they had opportunities like this.

Q Now, sir, did you think that that was the negotiation that took place between the holding company and the bank over the $42 price?

A Actually that is pretty much the discussion, yes.

Q And was it your understanding, sir, that Mr. Yeonas was negotiating on behalf of the bank and its minority stockholders?

A It would be my opinion that Mr. Yeonas was trying to find out what was best for the bank and what we could expect to be able to do in the way of the price, and he was looking out for the bank as well as all the minority stockholders, and he is a sizable stockholder and he was a sizable stockholder, so I assume he was looking out for himself as well.

* * * *

[276] Q Was it your understanding, sir, that Mr. Beddow was negotiating on behalf of the holding company?

A Not really. I don't think so. I think he was just giving an opinion as a director, and representing the majority.

Q In any event, that's all you are aware of that you are now suggesting might have been negotiations?

A That's all I can remember directly, yes.

Q And you don't believe Mr. Beddow was negotiating?

A I won't answer that.

* * * *

[281] Q And, sir, during the time that your board was considering this merger, it's true, isn't it, that Mr. Beddow didn't tell you or the other board members about any analysis by Mr. Scoffone that showed that the transaction would be profitable to the holding company even at $61 a share?

A I do not believe we knew of that analysis.

[282] Q Now, sir, on the 29th of January, did someone from Keefe, Bruyette & Woods make a presentation to you and some other directors?

A Yes.

Q Do you remember, was that Mr. Connor?

A I believe that it was Mr. Connor.

Q It was somebody else with him but he was the principal spokesperson?

A That's what I believe, yes.

Q Would you look, sir, at your exhibit book at Exhibit O. There should be there sets of two minutes of meetings. The first set is of the February 10 board meeting. If you would look please at the second set, it should be of the January 29 meeting. It should be toward the rear of that exhibit O.

A January 29. I have that.

Q Is that a copy of so much of the minutes of that meeting that have to do with this transaction? It's what your counsel produced to us as being that.

A It appears to be, yes.

Q And those people listed there, those are the people who were at the meeting, as best you remembr?

A Yes.

Q And is it true that those were the members of your executive committee, plus Mr. Broyhill?

[283] A Yes.

Q Do you remember, sir, at that meeting that Mr. Connor made a presentation, did he, about the $42 price?

A Beg your pardon?

Q Do you remember that Mr. Connor made some presentation to the group?

A Yes.

Q And was the gist of his presentation that any price over that market price of $32 or so would be a fair price to the minority stockholders?

A Any price over $32.

Q Over the market price, which we have understood—

A I don't remember that. I remember only that he presented some figures to us, and he explained the basis for his figures; and which was saying that he felt $42 was a fair share, and he answered questions from members of the executive committee.

Q Can you remember what was the gist of his rationale as to why $42 was fair?

A I do not remember specifically.

Q Do you remember, sir, that you, in essence agreed with it?

A We substantially agreed—yes, we did agree with it.

Q It isn't a case, though, sir, isn't it, that you [284] wouldn't have sold your stock at anything near that $32 market price?

A I would have preferred to keep my stock. If I were going to sell it, which was the case here, I believed it to be a fair price.

Q You believed what to be a fair price?

A The $42 to be a fair price.

Q You wouldn't have sold yours at $32 or thereabouts?

A No, I would not.

Q Now, sir, look if you would at Exhibit Z in your book in front of you.

Do you recognize that, sir, as the letter which you received from Mr. Boyle of Keefe, Bruyette in April of 1987 and have you enclosed in it some copies of some charts or handouts?

A I guess this is the letter. It's addressed to me. I am assuming that it is. What happened, as you know from the deposition, is that Keefe, Bruyette presented some figures to us to review at our January 29th meeting; and as we saw in the deposition, there were some updating of those figures between that time and the figures that we received on April 13th. We did request additional information—we did request additional copies of the handout of the discussion. I don't remember specifically receiving that. But I assume that I did.

[285] Q Are the enclosures to the letter, Exhibit Z, do they look essentially like the kind of handouts that Mr. Connor gave you at the January 29 meeting?

A Essentially, but as I pointed out, there are two or three different sets of figures here from the standpoint of the date that they were prepared on, and I cannot specifically tell you when I saw each of these.

Q I just want to be clear as between you and me that the enclosures are the kinds of things that were given out by Keefe, Bruyette on January 29th?

A They appear to be, yes.

Q Those are essentially studies that have to do with the kinds of things Mr. Krabill talked about yesterday, price earnings ratios, the premiums and that type of thing?

A It was hard for me to recognize what I had read from them and what Mr. Krabill said yesterday. I think there is some difference. I really think that Keefe, Bruyette is in a much better position to explain the background of their figures than I am.

Q I am not intending to ask that. I am just trying to understand that the kind of things that Keefe, Bruyette handed out were in fact these price earnings analysis—

A Yes.

Q —and all that type of investment banker financial analyst type of thing?

[286] A Yes.

Q And you don't claim, sir, that you and your directors have that kind of expertise, that kind of financial analyst or investment banker's kind of expertise?

A I don't claim that we are experts in the field, and we have not made analyses such as this to determine prices of bank stock.

Q And you didn't or your didn't have any employee at the bank prepare any kind of analysis of the value of the minority stock of the bank either, did you, sir?

A We had our financial officer, who was at the bank, and he of course prepared on a monthly basis the financial figures of the bank. We knew what the book value of the bank was, and we knew what the market value was, and we knew essentially what we considered the updated market value as it affected a share of stock within the bank.

Q My question to you, sir, was just whether isn't it your testimony that you didn't have any employee of the bank prepare any analysis of the value of the minority stock?

A We did not.

Q Now, sir, would you look at Tab V of your exhibit book, and in particular, I think there are—

A B or V?

Q V as in Victor.

There are four documents there. One of them, [287] maybe about the third one, is 8051 numbered on the bottom. Let me know if you have found it.

A Yes. I am reading it, thank you.

Q Is that your handwriting at the top, "Steps we took for analysis"?

A That's right.

Q And is this exhibit, which we will call it V-1, is this something that you prepared with the help of your lawyers on the day before the stockholders' meeting?

A The wording at the top was a reminder to myself that if we got into a discussion of this, that I would mention the steps that we took in making the analysis.

Q And this is an accurate account of the steps that you did take?

A That page is an accurate accounting of one of several steps that we took, and it speaks only to the subject of Keefe, Bruyette study. We made several other analyses—judgments—as I mentioned yesterday, and I will be glad to go into those if you like.

Q Maybe you could just look at the next page, 8052, is that your handwriting, sir?

A Yes, it is.

Q And it's entitled, "Considerations."

A Um hum.

Q Did you also prepare that on the day before the [288] stockholders' meeting in April of '87?

A Either that or the day of the meeting.

Q One or the other, the April 20th or 21st, 1987?

A Yes.

Q Is that, sir, an accurate statement of the considerations that you and your board considered in deciding to approve the elimination of the minority at $42?

A Yes.

Q So is it fair to say, sir, that 8051 and 8052 together contained both the steps for analysis relating to Keefe, and then the other considerations that you refer to?

A It would seem to me that 51 refers, is referred to as one of the items of 52.

Q Very good, sir.

Now, on 8051, in the paragraph in the middle there, it recites met, decided their figures, I guess that's Keefe, Bruyette & Woods' figures and assumptions were reasonable and decided it would be inappropriate to have the expense of an additional appraisal.

Do you see that, do you, sir?

A Yes.

Q As of that time you made that decision, you didn't know what the expense of an additional appraisal would be. did you, sir?

A Not from them, no, or any other group. We had [289] rough estimates from analyses having been made on other occasions, but no, we did not know.

Q Who gave the rough estimate if anybody?

A No one at that time.

* * * *

[292] Q That is the agenda, is it, sir, for the February 12 meeting?

A It appears to be part of the agenda. yes.

Q The items—there are 20 items on the agenda and items 2 through 15 have been blocked out, have they?

A All right.

Q They were blocked out by your counsel as not having any bearing on this case.

Is it correct, sir, that item 17 out of the agenda as indicated here, was to act on executive committee recommendations and tender offer. Is that right?

A Again, that was an error on I guess my part between my secretary and myself. It's an error.

Q Is it the case that at that meeting on the 12th, your board did, as the 17th item on the agenda approve the holding company's freeze-out merger proposal?

A It approved the resolution of the merger proposal, yes.

Q And—

A Subject to the annual meeting and vote of the stockholders.

[293] Q But so far as the board was concerned, it took action approving the merger at that February 12th meeting?

A Yes.

Q Now, and is it correct here as indicated on the agenda that the meeting adjourned at 10:20 in the morning?

A I assume.

Q And the meeting had started at 9:00, had it, sir?

A 9:00.

Q Was there—there wasn't any written report made by the group that had heard Keefe, Bruyette & Woods, was there?

A I don't believe so, because I made the report. I may have had notes. I don't remember them, but I made the report.

Q It's also true, isn't it, that there isn't anything in the minutes anywhere of the bank delegating any authority with respect to this merger to any committee?

A I would have thought that on January 15th that we directed a committee to, the executive committee, plus Mr. Broyhill, to come back with the recommendation.

Q There is nothing in the bank's minutes to that effect, is there?

A I don't have the minutes for that day. So I can't answer that question.

Q You remember there was some discussion about this [294] at your deposition and a representation was made by Mr. Stump that there was no reference in the January 15th minutes to this merger at all?

A No, I don't remember that.

Q In any event, you are not aware of any minutes?

A I don't know either way. I don't have the minutes. If you will show me the minutes, I will try to give you an answer.

Q Well, your counsel has produced to us, sir, whatever minutes—

THE COURT: Minutes are either going to reveal it or not. We don't have to spend any more time on that.

MR. HASSETT: Very good.

BY MR. HASSETT:

Q Was that February 12th meeting, Mr. Drewer, the first time that your board saw the merger agreement?

A The full board, yes, it would have been.

Q Do you know if anybody else had seen that merger agreement?

A No, I do not know.

Q In fact, sir, the executive committee didn't have that merger agreement before it, did it, on January 29th?

A I don't remember. That's the reason I hesitated. I don't remember whether the executive committee had it or not. I assumed that Ms. Orfe, our counsel, will remember, [295] but I don't.

Q Now, sir, would you look, please, at Exhibit O again, O-1, this time, which is the minutes of the meeting at which the board approved the merger on February 12th.

A Yes.

Q And look if you would on the second of the two pages of those minutes, the third "Resolved" paragraph down. You see the paragraph that says, "Resolved, that the preliminary proxies listing material and such material relates to the agreement and plan of merger, submitted to this meeting, is hereby approved, with the officers named in the foregoing resolutions being authorized to agree to such changes, amendments and additions as they have on the advice of counsel may deem necessary and desirable to have such material comply with applicable rules and regulations of State and Federal regulatory agencies."

Do you see that paragraph?

A Yes.

Q That's the resolution that was adopted at that meeting, is it?

A Yes.

Q In fact, no proxy materials were submitted to the meeting, were they?

A No, they were not.

* * * *

[296] Q Mr. Drewer, it is true, isn't it, that you and Mr. Beddow are the only two directors who read or reviewed the proxy statement before it was sent to the stockholders?

A I don't know that Mr. Beddow reviewed it.

Q So as far as you know, you are the only director who reviewed it?

A Yes.

Q And when you reviewed it, you essentially, did you not, relied on some lawyers to prepare it and you didn't try to read it word for word?

A I reviewed it. I would not say I read every word, but I reviewed it in what I thought was a complete manner.

Q You don't remember reading the section that is entitled, "Recommendation of the board of directors," do you?

[297] A Will you show me?

Q It's on page 16. It's Exhibit T. There is a section there entitled "Recommendations of the board, reasons for the merger." The question is whether it's your testimony that you don't remember reading that particular section.

A I don't specifically remember now reading that particular statement, no.

Q Now, sir, during the time that this holding company proposal was before your board for a decision, did you frequently meet with Robert Altman from the holding company?

A Bob Altman and I periodically have meetings, management meetings.

Q And you did during this time period?

A I am sure I did. At our depositions, I had my calendar with me. I could tell you—I believe I told you then as best I could what meetings. So I guess the record will show that.

Q Did you have a meeting with them on the day before the stockholders' meeting, April 20th?

A He was in a meeting that I was in with a group of lawyers, yes.

Q Did Mr. Altman address any particular exhibit to you with respect to this merger process?

* * * *

[302] Q Mr. Drewer, you knew a great many of the stockholders at the bank, didn't you?

A I knew quite a few.

Q You knew, didn't you, that a great many of them had held their stock for quite a long time?

A Yes.

Q As of the time that you and the board approved this merger, you didn't have any knowledge that any stockholder had any particular need to be selling his or her stock at that time?

A Not specifically.

* * * *

CROSS EXAMINATION

* * * *

[305] Q Can the holding company tell you what to do, call the shots at the bank, Mr. Drewer?

A I guess they could tell somebody what to do, but I feel that our board of directors and our officers of the bank and myself included that we would take the responsibility for running our bank. We naturally receive directions from Mr. Clifford and the holding company as we operate, but we do operate as an independent institution.

Q Did you have any belief before the time on January 13 when you were informed that the buy-in of the minority shares was going to be, was in fact being proposed, that such a thing might happen at some time?

A It had been discussed two or three years previously that they might be interested, but for over a year absolutely nothing had been said about it.

Q When you met on the 13th with Mr. Clifford and the [306] others and heard what the proposal was, what was your reaction to it?

A My immediate reaction, well, one—first, let me say that I had thought that somewhere along the line, they were going to want to buy all the stock. Secondly, my reaction to the price was that it was a reasonable price,

and then my third one was to really figure out what the steps that we were going to need to take to determine if the price were fair and the process that we would go through if it were considered fair to consummate the deal so that the stock could be bought or that we could go through our merger agreement and have the annual meeting and so forth.

Q What steps would the board have taken, or would you have taken if the price were not fair, Mr. Drewer?

A We would have voted against it.

Q And would the merger then have taken place?

A I don't know.

Q That is, would the merger have taken place without board approval?

A It could not. If I understand the law, the board of directors does have to recommend to the stockholders.

Q Was that your understanding on the 13th of January, 1987?

A Well, surely by the time we voted on February 12th, it was understood.

[307] Q All right. Did you then bring the proposal back to the board of directors on the 15th as Mr. Hassett developed?

A I told the directors on the 15th of January what the proposal was of the holding company and the steps that we thought we would have to go through in order to determine if we were in favor of it and the process, the legal processes we would have to go through.

Q What part did Mr. Beddow play on the 15th of January?

A I don't remember what Mr. Beddow said. I am sure he may have said something. Mr. Beddow is not a real extrovert in the sense of really speaking up a lot at board meetings. He does have experience. I am sure he added something. We have already mentioned the question of Mr. Yeonas to him. And how he reacted to that, beyond what I said yesterday, I could not tell you.

Q Which one of you carried the ball on presenting the proposal on February 15th?

A I did.

Q If your deposition is before you, I would like to refer you to page 97 that Mr. Hassett was examining you on yesterday. If not, I would like to hand it up to you.

Let me hand it up to you, Mr. Drewer.

(Law Clerk handing deposition to witness)

[308] BY MR. STUMP:

Q Would you look, please, sir, at page 97 that Mr. Hassett referred you to yesterday.

MR. HASSETT: Objection, Your Honor. I don't understand what the purpose of this is.

MR. STUMP: Following Your Honor's directions that I wait until I examine to fill out what was left out of the—

THE COURT: I think counsel is entitled to go into those portions of the deposition you referred to, if he feels and it's the case that something was left out that needs to be put in to make the answer that was given yesterday sensible.

BY MR. STUMP:

Q Are you at page 97, Mr. Drewer?

A Yes, I am.

Q Mr. Hassett's question at lines 4 through 6 I will read, and then I will ask you to tell the jury your answer. The question was: "Tell me as best you can recall what you said, sir, to the board of directors respecting the procedure or process."

Would you give your answer, please.

A "I can only give you general statements, that I told them I had had a meeting with Mr. Clifford, that it was the wish of the holding company to purchase all of the stock, that the price that they had had an outside consultant come in, that the price that they had had offered

was $42 a [309] share, and that it was going to be necessary for us to as the board of directors to decide whether that was a fair price or not or what we wanted to do about the offer, and that it was hoped that we would proceed along with the process and ask them, you know, for any input that they have and the process by which they wanted us to follow to come up with a determination as to whether it was a fair price or not. And then I would have asked, I am sure I asked Mr. Beddow to add anything that I hadn't already said."

Q Thank you, sir.

Now, I believe at page 53 of your deposition, you were asked yesterday of Mr. Beddow cautioned the board about being over zealous in its activity, and that question and answer, parts of which were read to you, begin on page 52, at line 12. I will ask the question Mr. Hassett asked you and ask you to give the jury your answer. At line 12 he asked you? "What was the general discussion of the board of directors on the subject?"

Would you tell the jury your answer.

A "Just that what the law was with regards to buying of all of the stock, the merger process that we went through, our responsibiiity to be doubly sure that we got a fair price and that we had to take special consideration of the minority stockholders on both sides, one that we get a fair price on the high side, that we could there, but at the same time that [310] we not be over zealous and the deal might fall through and that we might harm the stockholders who felt a real need to sell and thought $42 was—and they just wanted that price. So we had to worry about stockholders on both sides. One, if we did make a deal and one if we didn't make the deal, which meant we had to come up with a fair price."

Q Now, when you speak of stockholders on both sides in that answer, Mr. Drewer, are you referring to minority stockholders on both sides?

A Yes, I am referring to minority stockholders, those who might think that $42 was not enough and those who

might think that they just needed to sell and would say, hey, if you didn't take the $42 a share, you really messed us up.

Q Now, how as you and the board focused on this issue, did you approach the resolution of this problem of some minority shareholders who would prefer not to sell and some who would want you to take the offer?

A I can only say that the process that we are going through was a merger and so we just had to be assured that we came up with what was a fair price for the stock for everyone, regardless of their desires.

Q On the 15th of January, sir, the first board meeting, tell the jury please what the board decided concerning the merger?

A They decided that we would proceed and make all the [311] necessary studies that we should to determine what a fair price was.

Q Was the entire board going to do that?

A The entire board was not going to do that. It was going to be done by the executive committee plus Mr. Broyhill, as I previously mentioned, was the largest stockholder of the directors.

Q How many shares did he have?

A 30,000 maybe.

Q How many did you have?

A My and my immediate family, 5,800-some.

Q How frequently does the board meet?

A The board meets monthly, the second Thursday.

Q How frequently does the executive committee meet?

A Every Thursday.

Q Does that include the Thursdays on which the board meets?

A Yes. We meet afterwards.

Q Yes, sir. Now, on the 15th, when the executive committee met after the board meeting, were you in attendance?

A Yes.

Q Would you tell the jury, please, what took place at that initial meeting of the executive committee following the announcement of the proposal?

A We decided that the approach that we were going to [312] take to that, one, we were going to get our in-house counsel involved to make sure that we were taking the legal steps that we should. We were decided to ask Mr. Beddow and Bankshares if they would ask Keefe, Bruyette to come down in order that we might listen to what they had to say about the analysis that they made. There was some question as to whether we should get another outside consultant to give their estimates on what the price should be or whether the information that we heard from Keefe, Bruyette might be in line with our thinking to the point that we thought that their reasoning was sound. That basically is what we did at that meeting.

Q On the 15th, how did you resolve the question of whether at that time to hire someone else or whether to do something other than that?

A We all agreed to wait until we had had the report from Keefe, Bruyette and then at that time we would make the decision as to whether to go outside.

Q Now, your next meeting would have been a week later on January 22. What happened then?

A I know Keefe, Bruyette didn't show up and my memory says there was a big snow in New York and they couldn't get down. We had our meeting. I have no memory of a discussion, although I'm sure it came up, I have no memory of a discussion.

Q On January 29, the executive committee met again.

A Yes, it did.

[313] Q Would you tell the jury, please, what happened with respect to the merger on that date?

A Well, at that time, Keefe, Bruyette came in, told us who they were, and presented their analysis and then answered questions that we might have of them. And following that period, then we asked those people to leave

and we went into our session and had a full discussion of all the issues. At that meeting, we had Ms. Orfe present, and we had our chief financial officer present. We went through all the various steps looking at once again the book price, the market price, the effect on our stockholders, the steps that we had to go through. I will add one more time that I felt very comfortable with the process that we went through, because we have in our board of directors what I think are a group of very outstanding people, and they know Northern Virginia. They know the bank. They are in all facets of life, whether it's education, we have engineers, we have—

THE COURT: I am not sure what question Mr. Drewer is answering.

THE WITNESS: Well, sir, I was trying to answer what we went through and our judgment on it.

BY MR. STUMP:

Q The question that I should have posed, Your Honor, on whom did you, Mr. Drewer, rely other than your own judgment [314] in making your decision about this matter?

A I hope I have already answered that by saying our board of directors.

Q Which members of the board?

A Well, I respect the judgment of all of them. They each have their own expertise. At the January 29th meeting, in one of the exhibits I have looked at this morning, those people were listed.

Q What next occurred in the board's consideration of the merger?

A We at the executive committee on the 29th voted unanimously to accept the offer of $42 as a fair price and that they were going to recommend to the board of directors that we accept that price and that we go through the procedure of the merger, so that the deal would be consummated when possible.

Q Now, on February 12th was your next board meeting?

A Yes.

Q Tell us please what occurred at that time.

A At that time I told the board of directors what the unanimous opinion of the executive committee was. I gave the reasoning behind why we thought it was a fair price. I told them also that we had reviewed with Keefe, Bruyette their report. We felt that the report that they had made was objective and was reasonable and therefore we did not think [315] that it was necessary or even appropriate for us to go outside and get an outside financial adviser. In addition to that, we did following that, had a full discussion with other members of the board. We did vote, and the board of directors voted unanimously to proceed with the merger. We had at that meeting the merger agreement and a resolution which we signed authorizing such action.

Q And the merger agreement if you will refer to Exhibit T. That's in the back of Exhibit T, isn't it?

A Yes, it is.

Q That's the one to which you are referring?

A Yes, it is.

Q Does that bear the signature—

A And it bears the signatures of the directors that were present.

Q Now, yesterday, Mr. Drewer, there was discussion concerning a letter that you will also find back there. I believe right now you are looking at Appendix 2 to Exhibit T and there is Appendix 3 to Exhibit T. I also want to hand up to you so you can look at them together what I represent is an identical, a letter identical to Exhibit F, and I would like to be able to look at both Exhibit F and Exhibit T at the same time.

(Marshal handing exhibit to witness)

[316] BY MR. STUMP:

Q Now, first of all, Mr. Drewer, what is the date on Exhibit F?

A December 9th, 1986.

Q And who is the originator of Exhibit F?

A The originator is Keefe, Bruyette & Woods.

Q Now, moving now back to Exhibit T, Appendix 3, what is the date on that document?

A That's January 12th, 1987.

Q And who is the originator of that document?

A That is also Keefe, Bruyette & Woods.

Q In your deposition, were you questioned about both documents?

A I obviously was. I guess I was, and I was obviously confused.

Q I am not talking about yesterday right now. I am talking about back in your deposition, were you not at that time questioned about both of these letters?

A My memory is so bad on these two letters that it's very hard for me to give you an exact answer. I was asked the question back in the deposition. If I had seen this letter, which I guess was the letter from Keefe, Bruyette to Jack W. Beddow, which was a commitment to perform this study analysis—

Q So the record is clear, the letter to which you are [317] referring right now.

A That's Exhibit F.

Q In 1986, December?

A In 1986, and I said at that time I had not seen it, and I still—I had not seen it.

Q So you had never seen exhibit F until Mr. Hassett showed it to you at your deposition in this case. Is that true?

A That's true.

Q Now with respect to Exhibit T, the January 12, 1987 letter, tell the jury what you can about what you know about that letter.

A Unfortunately, I think yesterday I said I hadn't seen that before, too, but that's where I am confused, because I thought I was looking at the other one. As I read this one, I know I did see it, and it was a part, as Mr. Hassett has reminded me, of the proxy statement which I had seen before.

Q I am going to call the December '86 letter the engagement letter and the January letter, the opinion letter.

A Yes.

Q So that the record is clear, tell us when you first saw the engagement letter and when you first saw the opinion letter. The engagement letter is December, the opinion letter is January.

A I did not see the engagement letter until the [318] deposition when Mr. Hassett showed it to me at that time, which was May 17th.

Q All right. Exhibit T, the opinion letter, when did you first see that?

A I can't tell you exactly when I first saw that letter, but I obviously saw it by the time I signed the proxy for the April annual meeting.

Q All right.

I would now like to ask you to look if you would at Exhibit 8. Do you have the exhibit books there? If not, I should hand you up Exhibit 8 of the Directors' Exhibits.

A I have letters. I don't have numbers.

(The Marshal handing exhibit to witness)

BY MR. STUMP:

Q The number after the Tab 8.

A Yes.

Q I'm sorry, Mr. Drewer. 9. Exhibit 9.

A Yes.

Q What is Exhibit—

A I am not there yet. Yes, not I am there.

Q What is Exhibit 9, sir?

A That is a stock offering by the First American Bank of Virginia to the stockholders.

Q And would you tell the jury first of all whether you were involved in the preparation and mailing out of this [319] stock offering?

A To the extent that I authorized it after the board, after we agreed at the board to make the stock offering, I authorized it, reviewed it, and yes, sent it out.

Q What was the date of the offer?
A The circular is dated February 13th, 1986.
MR. STUMP: Your Honor, I offer Exhibit 9.
THE COURT: Any objection?
MR. HASSETT: No.
THE COURT: If not, it will be received in evidence.

(Directors' Exhibit No. 9 was received in evidence.)

BY MR. STUMP:

Q What were the financial facts of that offering, Mr. Drewer, made in February of 1986, the year before the events we are discussing?

A It was offering all the stockholders of the bank the opportunity to buy additional shares of stock at $30 a share and that they had one right, if you will, which is the privilege of buying, if you consider it a privilege, of buying another share of stock for every 28 shares that you have.

Q Did shareholders who had fewer than 28 shares have the right to buy a share by virtue of their holdings of fewer than 28 shares under the offering?

A I haven't read this recently, but I believe yes.

[320] Q And do you know, do you remember what the reception to the rights offering was? That is, did the minority shareholders buy up all the shares they could get under the offering?

A No, they did not. There were a good number that did not take the shares. We were, either through other minority stockholders buying or the holding company taking it, we were fully subscribed but no, not all of them.

Q At the time that you were considering the merger, did this rights offering play any part in your feelings about what ought to be done?

A Only from the standpoint that it was getting tougher to get people to purchase the stock when we had offerings such as this.

Q Did the relationship between the $30 price and the $42 price play any part in your consideration?

A I guess I compared the $30 which is about what the market was at the time that we made the offering, the $32, which I sort of put the two together and from that standpoint, and saw that stockholders were in fact getting a reasonable profit on their purchases.

MR. STUMP: Indulge me a moment, Your Honor.

(Pause in the proceedings)

MR. STUMP: Your Honor, I have no further questions of this witness.

[321] BY MR. CAWLEY:

Q Good morning, Mr. Drewer. I just have a couple of questions.

When you met with Mr. Clifford on January 13th, 1987, at which time Mr. Clifford indicated to you that the holding company was making this proposal, did Mr. Clifford give you a timetable that you had to fulfill in order to have your board consider this matter?

A No.

Q And can you state whether or not the holding company put pressure on your directors in any fashion to approve this merger?

A No.

Q Did Mr. Beddow in the meetings try to coerce or pressure—

A No.

Q —the directors in any way?

A No.

* * * *

[322] REDIRECT EXAMINATION

BY MR. HASSETT:

Q Mr. Drewer, on this rights offering that you have just been talking about, was there any reason why you didn't mention that in your notes that you made, the

Exhibit V-1 and V-2 as factors that you and the board considered in deciding to approve this transaction?

A Well, actually, as I just said here, I just sort of lumped them together, if you will, with the current market price and looked at the two the same.

Q Am I right, sir, that in order for a stockholder to subscribe in one of these rights offerings, that he or she has to have some spare cash at hand to make the subscription?

A Either that or have the ability to borrow money.

Q And is it true, sir, that shares that are not taken up by people who might not have the money to do it can be bought by the holding company?

A Everyone who is a stockholder has the right to buy a pro rata share of the stock.

Q So isn't it true, sir, that the effect of this kind of rights offering is at least in part to permit the holding company to increase its percentage ownership at the offering price?

A The purpose of this rights offering was additional capital.

[323] Q My question, sir, was whether that was in effect.

A No, I don't think that was—that had nothing to do with the subject.

Q Drawing a distinction, if you would, sir, between the purpose and effect. Wasn't it the effect of this offering that the holding company's percentage ownership in the bank increased.

A They had the same pro rata right as any other minority stockholder of buying stock.

Q And following this rights offering, did the holding company's percentage of ownership increase?

A If it did, it was very slight.

* * * *

TESTIMONY OF LATHAN M. EWERS, JR.

[324] DIRECT EXAMINATION

* * * *

Q And are you a member of the law firm of Hunton & Williams, sir?

A That's correct.

Q And you practice law here in Virginia?

A That's correct.

Q Could you look, please, and there is an exhibit book in front of you, and one of them, I think it's probably the thicker book, I think that one, look if you would at Tab S, as in Sam.

A All right, I have it.

Q Is that entitled "Draft 7-11-86, First American Bank Proxy Statement"?

A That's correct. That's the date of the draft.

Q Did you prepare that, sir?

A Yes.

Q And were you asked to do that by the First American Bankshares, Inc., holding company?

A Mr. Beddow called me sometime prior to that date and said that the holding company was negotiating with the First Virginia Bank to acquire the minority interest, and I [325] suggested that we had a model proxy statement that we used in transaction of the type to make acquisitions and he asked me to go ahead and just prepare it, using such information as I had.

Q You were doing that, were you not, sir, as an attorney for the holding company?

A At that time. Mr. Beddow asked me to do it, yes.

Q Did you at some later time become retained by the bank, with respect to this merger transaction?

A Well, many months later, Mr. Beddow called me again and said that agreement had been reached in principle and that I cannot recall whether he asked me to call the bank's in-house counsel, Ms. Orfe, or she was to call me. I cannot recall that, but from that point on, we

worked together in getting this draft document into shape for the bank's annual meeting.

Q Am I right, sir, that you were asked to do that by Mr. Beddow and your client was the holding company.

A Well, at that point in time, in these bank acquisitions where it becomes a nonadversarial relationship after agreement is reached, I really considered I was working for the holding company and all of its subsidiaries. I have done this before for them.

Q And to ask kind of a key question: you sent your bill to the holding company, did you not, sir?

[326] A I sent my bill to Mr. Beddow, that's correct.

Q Now, sir, in the summer of 1986 when you prepared this draft proxy statement, so far as you knew, the directors of the bank had no idea that a merger was in the works, did they?

A So far as I knew, I did not know at that time whether he had talked to the director or not.

Q Would you look, please, sir, at page 13 of the draft proxy statement you prepared in July 1986.

A Are you talking about the page numbers at the foot of the page or at the top of the page?

Q I'm sorry. At the top. I am looking at a paragraph I would like you to look at with me if you would. It begins, "The plan of merger has been approved by the board of directors, because it provides an opportunity for First American's public shareholders to achieve a high value for their shares. The price to be paid is about blank percent higher than the blank dollars per share in which First American common stock traded on blank date, the last trading date prior to the announcement of the proposal. In evaluating the fairness of the merger to the public holders of First American common stock, the board was aware that the net book value per share at June 30th, 1986 of the common stock was blank dollars per share. And the December 31, 1985 was blank dollars per share, and that the blank dollars per share which [327] would be paid to public holders of the First American common stock represents a premium of approximately blank percent and blank percent respectively over the book value of First American common stock and such date."

At the time that you drafted that paragraph, sir, it's true, isn't it, that the board of directors of the bank hadn't taken any action at all on this transaction?

A At that time, that's correct.

Q Now—

A I should add that that's a boilerplate provision that I could get dozens of proxy statements that I have prepared that you include. There is no change there, just the fact as you always look at it in a bank merger. It came out of a model format that we have in the office. I didn't craft it for this particular deal.

Q I see. Is all of Exhibit S model format of the kind that you believe should be used in this kind of a transaction?

A It's certainly the starting point. It's the first draft of many, but it's the starting point.

Q And look if you would at page 14 of Exhibit S. Under the heading "opinion of financial adviser" is this language which you regard as the proper form. "Blank has delivered its written opinion to the board of directors that blank dollars per share of cash to be paid to the public holders of the First American common stock is fair to the [328] holders of such shares."

A Well, there is no requirement that an opinion of a financial adviser be obtained, but this is in the particular model that I pulled off of the shelf, this particular disclosure was in it, yes.

Q It includes the disclosure of an opinion, of an adviser to the bank saying that this price is fair to the stockholders at the bank, does it not?

A That's what it says. This particular model—once again, this is not a prescription. This is just one particular approach. It's not the only approach.

Q This is the approach that you put together to give to Mr. Beddow, wasn't it?

A It's the model I used, that's correct.

Q Am I right, sir, that the handwriting on Exhibit S is not yours?

A Well, I haven't flipped through every page, but the handwriting at the beginning on most of the pages, I think, is someone else's writing.

Q Do you happen to know whose else it is?

A I think it's Jan Orfe's, the bank's in-house counsel.

Q You worked with Ms. Orfe in preparing the final proxy statement?

A Many months later when we learned that agreement [329] was reached, I met her for the first time over the phone, and we worked together on the document.

Q Is it fair to say, sir, that insofar as the final proxy statement discussed the merger at all, it was drafted by you?

A No, that would not be a fair statement, because both she and I had a lot to say about it. She had had input and so it would be fair to say that together we had drafted the document.

Q It would be fair to say at any rate, would it not, sir, that the paragraph that I read a few moments ago about the recommendation of the board of directors, that is one you drafted, isn't it?

A That came out of a Hunton & Williams form that I used, that's correct.

Q Is it accurate also to say that the—I am going to look now for a minute at Exhibit T, which is the final proxy statement. The discussion there on page 3, opinion of investment banker, is that something you drafted?

* * * *

[330] THE WITNESS: Well, this final document was the result not just of my work and Jan Orfe's, and I don't have it here but it was circulated to a number of people in the bank, financial people, officers. It was sent to the holding company for their comments. We received

comments from a wide number of people, and all of those comments were incorporated, if they were appropriate into the final draft. So it's really a committee effort. I don't take credit for the final thing.

BY MR. HASSETT:

Q Did you get some comment from Mr. Beddow, sir?

A I just can't recollect whether he specifically called me with specific comments. He was on the circulation list.

* * * *

Q Mr. Ewers, if you would, please, look at Exhibit P, [331] and just tell me if that is a letter that you received from Ms. Orfe.

A Yes.

Q And if you would, please, look at Exhibit CC, toward the back of the volume.

A Did you say CC?

Q Yes, sir. After we get to Z, we have got AA, BB, CC.

A I see, correct. Okay.

Q CC, that is the letter that you wrote to Mr. Lee, is it?

A That's correct.

Q Bear with me, if you would, and look at BB. Is BB a resolution that you prepared, sir?

A Yes.

Q And that is the resolution that was prepared for adoption by the bank's board, was it not, approving the merger?

A Yes. Jan Orfe, who does a lot of things for the bank, as a corporate specialist, she asked if I would help her by drafting up the resolutions relating to the merger for the bank board meeting, which I did.

Q Did you also, sir, draft Exhibit AA, which is the agreement and plan of merger?

A That originated in my office, yes.

[332] Q And was your first draft, was this your first draft of it here on February 6th, '87?

A I don't know whether it was the first draft; we may have had several drafts internally in the office before we sent out, so—

Q This Exhibit AA is the first one that was sent out?

A I can't testify to that either. It probably was but I can't testify to it for a fact. I don't know whether a previous draft had been sent out.

This is not a draft, by the way, because once a document becomes final, we drop the word draft, but always leave a date just so you can know when it was prepared. It wasn't sent out in the sense that it was final from the bank or the records point of view, but it was sent out from my office as a suggested—(Pause).

* * * *

TESTIMONY OF JANIS ORFE

DIRECT EXAMINATION

* * * *

[335] Q Ms. Orfe, you were present, were you not, on the 29th of January, 1987, when some directors of the bank received a presentation from Mr. Connor of Keefe, Bruyette & Woods with respect to the then pending proposed merger?

A Yes, I was.

Q And would you like, please, on the top—well, I am not sure—in the book that is marked Plaintiff's Exhibits that is before you, look if you would at Exhibit M. That's M as in Mary.

A I have it.

Q Are those notes, Ms. Orfe, that you made during that meeting?

A These are copies of notes that I made during that meeting.

MR. HASSETT: Your Honor, we would move M into evidence.

MR. STUMP: No objection, Your Honor.

THE COURT: Be received.

(Plaintiff's Exhibit M was received in evidence.)

BY MR. HASSETT:

Q Ms. Orfe, if you would, look at the second page of those notes about two-thirds of the way down, and see where it says, "Re: Price for FAVB, parent set the price." I [336] believe your note there means not an open market, doesn't it?

A Yes.

Q "15 percent held, slash, little trading." Do you see that?

A Yes, I do see it.

Q Is it your testimony, Ms. Orfe, that those notes reflect your hearing Mr. Connor advise those present at the meeting that the parent company set the price for the bank's stock in the market, because it is not an open market for the stock and only 15 percent is held in the open market, and there is very little trading?

A I can't recall specifically that Mr. Connor grouped those thoughts together in a single sentence as you have just expressed it. I do recall specifically that on more than one occasion during the presentation Mr. Connor emphasized that there had been very little trading of the stock and that there was only a 15-percent minority interest available.

Q And do you remember as well that he said at some point that because of that circumstance, the parent set the price of the stock in the market?

A I do not recall that he specifically stated the parent set the price in the market.

MR. HASSETT: The Court's indulgence just a moment.

BY MR. HASSETT:

Q Ms. Orfe, at your deposition in this case, do you [337] remember the following question and answer?

MR. STUMP: Page number, please.

MR. HASSETT: The date is June 29, 1988, and the page is 71, 72. It begins with Mr. Stump saying "Excuse me, Ms. Orfe. I think that the question is intended to elicit any refreshed recollection you may have. Are you telling us that as you look at these notes your recollection is refreshed, or are you simply trying to interpret the notes?"

"No, it is refreshed, and that I know Keefe, Bruyette & Woods' focus during the presentation was on First American Bank of Virginia, that they understand that the 85 percent shareholder wished to buy out the minority shares, that the critical element in coming to a price for the stock would be the peer group. Term A was not my term. That as of '85 and '86 First American Bank of Virginia stock was trading at about $31 to $32 per share and that the book values of that same period for the stock were materially less, that the representatives from Keefe, Bruyette & Woods who reviewed representative stocks in the market and there are two things stated, peak 7-86, drop 12-86. That does not refresh my recollection. If I recall based on this document some acknowledgement by Keefe, Bruyette the parent company set the price because it's not an open market for the stock and only 15 percent is held in the open market, and there is very little trading although I have already told you that I had [338] recalled their saying that."

Then there are two questions or comments. "What effect on market value, rate comparisons. I don't know if that is different in the market or difficult in the market. I can't tell you that and I can't tell you who may have asked those questions."

Do you remember being asked that question and giving that answer?

A Yes, I do. And in your questions this morning, you have used the phrase twice that the parent set the price in the market; and what I have stated today is I do not recall that that's what Mr. Connor said. It's true

my notes say that the parent set the price, but in the market is what I am saying this morning, I did not say. That is not what my notes say.

Q You don't doubt that your testimony was as I just read it to you?

A I think the deposition speaks for itself.

Q Now, look if you would at Exhibit M, the next page after the one we just looked at. I'm sorry, the page after that. It bears the number 3018. Do you see the note at the top there, "How to keep PR afloat, how to prevent adverse reaction perception." That's a note that you made at the meeting?

A Yes. These are all notes that I made during that [339] meeting.

Q Do you remember if there was some discussion with Keefe, Bruyette & Woods and the directors as to how to keep the PR afloat and how to prevent adverse reaction or perception?

A I see what my notes say, and I don't recall any specific discussion about these topics as they are stated.

Q Do you recall any general discussion about those matters?

A I don't remember anything specific.

* * * *

[CROSS EXAMINATION]

* * * *

[341] Q Would you tell me, please, what the votes at the shareholder meeting were for and against the merger?

A I have to use this document to refresh my recollection, but the vote was as follows.

Q Before you do that, were you involved in the tabulation of the vote in working with Arthur Anderson. When you said refresh, you had knowledge at the time, did you?

A Yes, I did.

Q All right. Go ahead.

A The minutes indicate that of the shares votes, that 4,486,713 shares were voted in favor. The percentage was

96 percent. That is indicated in the minutes. And there were 124,182 shares votes against or two percent, and then there is an asterisk because, and this was part of my review, when we conferred with Arthur Andersen, we had to supplement these figures, which we did, and they further broke down the vote as indicated in the minutes.

Would you like me to recite that information as well?

[342] Q Please.

A After the meeting, Arthur Andersen noted that there were present in person or by proxy and entitled to vote the following number of shares: 4,633,595, that the votes for the plan of merger were 4,544,383, and against the merger, 70,182. I don't have the percentages.

* * * *

[RE-DIRECT EXAMINATION]

* * * *

[345] BY MR. HASSETT:

Q Ms. Orfe, is it correct that in order to have the stockholder approve—in order for the merger to become effective, the bank needed to have a stockholder meeting and it needed to send out a proxy statement for that meeting.

A It is true that it required shareholder approval. Whether that approval takes place at an annual meeting or at some other scheduled meeting will vary, depending on the timing.

Q But for whatever meeting it was, you had to have a proxy statement, be it special or annual?

MR. STUMP: That's another uncontested matter, Your Honor. We acknowledge that you have to have a proxy statement to advise of what is to come before a meeting of this type.

MR. HASSETT: Then I can sit down as well. Thank you, Ms. Orfe. Thank you, Your Honor.

THE COURT: You may step down.

* * * *

TESTIMONY OF EMANUEL A. BAKER, JR.

DIRECT EXAMINATION

* * * *

[349] Q At the meeting at which the board voted to approve this merger on February 12th, 1987, you were not given any proxy materials, were you?

A No, not that I remember.

Q And isn't it a fact that until you received the proxy statement in the mail in your capacity as a shareholder, you never saw the proxy statement?

A Yes, that's correct.

Q Did you also attend the January 15th meeting of the board of directors that's been referred to here in earlier testimony?

A Yes, I did.

Q And it was at that January 15th, 1987, meeting that you first learned about the holding company's plans to acquire the minority shares?

A Yes, that's correct.

Q It's your testimony, is it not, that there was no [350] discussion of the $42 price at that January meeting, right?

A Yes. That was my testimony, that's correct.

Q Do you know, sir, whether or not Mr. Drewer ever discussed the terms of that merger with anybody from the holding company?

A I have no knowledge that he did, absolutely none.

Q Did Mr. Drewer report to the board on any discussions that he had had with anybody at the holding company about the merger or its terms?

A There was a report on the January meeting from Mr. Drewer, but I don't remember that there was any reference to the holding company.

Q Was there any reference to any negotiations with the holding company?

A The January meeting was the first time that I had heard to my knowledge the first time that the board was

being informed of the interest of the holding company to purchase the minority stock. And Mr. Drewer presented the information in that form as a general information, this is what the interest is.

Q And if I correctly understand your testimony, you first learned about the fact of the merger at the January 15th meeting, and you first learned about the price for the merger at the February 12th meeting; is that right?

A That's what I have testified to, yes, that's correct.

[351] Q Am I correct that when you first learned about the fact of this merger in January, the fact of this acquisition by the holding company, it didn't surprise you, that you had expected for some time that the holding company would acquire the rest of the shares?

A That's correct.

Q You thought that was just good business for the holding company?

A That's correct.

Q Did you have any belief that it was good business for the bank?

A Yes, I did.

Q What was the basis for that belief?

A The belief was that it would save the bank considerable time and considerable money in the filing of the requisite, appropriate forms if they were a 100-percent owner.

Q It would eliminate paperwork, is that right?

A Eliminate paperwork and costs, yes.

Q Were there any other benefits to the bank?

A Those were the ones that came to my mind.

Q Now, at the February 12th meeting, when you first learned about the $42 price, isn't it your testimony that Mr. Beddow told you and the other members of the board that the holding company had commissioned a study to set this price?

[352] A I wouldn't phrase it that way. During the discussion of the merger, there was a discussion that Mr. —— there was comments made by Mr. Beddow that, yes,

and I was aware and the board was aware that there was a study commission, yes, that's correct.

Q And that is how you recall it, that Mr. Beddow said that the holding company commissioned a study?

A Well, I don't want to pick on words, but yes, that's what was said.

Q Did Mr. Beddow indicate who had done that study?

A Yes. The name Keefe, Bruyette & Woods was mentioned, yes.

Q Prior to February 12th, had you ever heard of Keefe, Bruyette & Woods?

A I really don't remember if that name was brought up at the January meeting or not, but between the two meetings, no, I was not particularly familiar with that firm or those names.

Q Now you know that Keefe, Bruyette & Woods was hired by the holding company, rights?

A Yes, that's correct.

Q They were not hired by the bank?

A Yes, that's correct.

Q And you understood throughout this process that Keefe, Bruyette & Woods was working for the holding company [353] and not for the bank?

A Yes, that's correct.

Q Is that right?

A That's correct.

Q Do you know, sir, who first came up with the $42 price? Was it the holding company or was it Keefe, Bruyette & Woods?

A That I don't know.

Q You don't know if on the one hand the holding company said we want to pay $42. Tell us if it's a fair price—

THE COURT: He said he doesn't know.

MR. CAWLEY: Asked and answered.

BY MR. MERNICK:

Q At the February 12th, board meeting, was there any discussion that you recall as to whether or not the

bank ought to hire a financial adviser like Keefe, Bruyette & Woods but one that was working for the bank and that was loyal to the bank as opposed to the holding company?

A Yes. That discussion, there was a question of that that did come up, yes.

Q And the directors of the bank decided not to hire such a financial adviser, right?

A Yes, that's correct.

Q Isn't it your testimony, sir, that the reason that [354] the directors did not decide to hire their own financial adviser was because Mr. Beddow said, "You don't need a financial adviser. The offer is $42, and the holding company won't go any higher because it doesn't need the remaining 15 percent of the stock"?

MR. CAWLEY: Is the question, did he say all those things or is that some sort of summary that you would like to put forward?

THE COURT: That's not grounds for an objection, Mr. Cawley.

MR. CAWLEY: Excuse me, Your Honor.

THE WITNESS: No, I didn't say that.

BY MR. MERNICK:

Q Did Mr. Beddow say to you and the other directors that the offer was $42 and FABI or the holding company wouldn't go any higher?

A Mr. Beddow did not phrase it that way. However, Mr. Beddow, it was clear in my mind that the holding company was making an offer of $42 cash, and the offer was firm.

Q Did Mr. Beddow make those comments in response to a discussion as to whether or not the bank should hire its own financial adviser?

A No, sir, not that I remember, absolutely not.

Q Mr. Baker, do you recall in your deposition being asked the following questions and giving the following [355] answers?

MR. VIETH: Page number, please, Your Honor.

MR. MERNICK: I'm sorry. Page No. 37. I apologize.

BY MR. MERNICK:

Q "Question: When Mr. Yeonas raised the possibility of a second appraisal was he a proponent of that idea, did he favor getting a second appraisal?"

"Answer: I don't remember that he came out as a proponent. It came out as a question. Mr. Yeonas is a very astute and very conservative business person and I think in that vein he raised the question. It's not my recollection that he spoke aggressively in favor or against. He thought it was a question that should be raised. He placed it out for discussion. It was discussed."

"Question: Did Mr. Beddow say anything in that discussion?"

"Answer: I am sure that he did, yes."

"Question: Do you recall what he said or what his position was?"

"Answer: What I recall was that Mr. Beddow made several points. Mr. Beddow is a very refined and articulate individual and his discussion was always very professional and very nonthreatening. He raised the point as a business person but everybody certainly understood who he represented, that the majority stockholders were offering $42 per share [356] cash and that the point that stuck in my mind was that they did not need the additional stock and that the $42 was a firm price, not subject to negotiation. That based on the study that had been made, the $42 cash offer was the offer. I believe he probably went through some of the study as to how that was arrived at. I believe that in substance was what Mr. Beddow had to contribute at the meeting."

"Question: I believe you stated that everyone understood who Mr. Beddow represented. What was everyone's understanding as to who Mr. Beddow represented?"

THE COURT: There isn't anything inconsistent. You haven't even asked him that.

MR. MERNICK: Your Honor, I understood him to say that Mr. Beddow did not make those points.

THE COURT: No, you are going way beyond that in reading other things that you want to get in.

BY MR. MERNICK:

Q Mr. Baker, that testimony that I have just read to you, is that an accurate summary of what occurred at the meeting?

A Yes, sir.

Q At the time that you voted in favor of this merger, at the February 12th board meeting, did you have any understanding at all as to the fee arrangement between Keefe, Bruyette & Woods and the holding company?

[357] A No.

Q Did you have any understanding at all that the engagement between Keefe, Bruyette & Woods and the holding company limited reliance on Keefe's opinions to the holding company?

A No.

Q Did you have any idea at the time you voted for this merger that Mr. Scoffone of the holding company had performed a financial analysis which showed that the holding company would have a net positive income benefit even at a price as high as $61 a share?

A No.

Q Mr. Baker, did you hear yesterday when Mr. Stump made his opening statement in the case, his reference to a similar proposal by the holding company to the First American Bank of Maryland two years earlier than this transaction?

A No.

Q Were you aware of that proposal that the holding company had made at the time you considered this merger for the Virginia Bank?

A It wasn't in my thought process, no.

Q It was not in your thought process?

A That's correct, it was not.

Q It had no influence on the decision that you made?

[358] A No.

MR. VIETH: Objection, Your Honor. That's been asked and answered.

BY MR. MERNICK:

Q Did you hear it discussed?

A No. I didn't hear it discussed, no.

MR. MERNICK: I don't have any more questions. Thank you, sir.

CROSS EXAMINATION

BY MR. VIETH:

Q Mr. Baker, I believe you testified that you first became a member of the board of directors of one of the predecessor institutions in 1976. Can you please explain to the[y] jury what institution that was?

A Yes. It was Clarendon Bank and Trust Company.

Q Did you serve continuously on the board of directors between '76 and currently?

A Yes. That's correct.

Q Mr. Baker, were you satisfied that the $42 price was fair?

A Yes. I was very satisfied with $42.

Q Would you please explain to the jury in general terms how you reached that conclusion?

A Yes. My thought process was that the holding company was offering $42 cash, and cash was significant in [359] my thought process, that it was an excellent opportunity for the minority stockholders to get out of the situation where there was never going to be a real market in stock. The majority stockholders obviously had 85 percent at that point. There was no interest in my mind that they would ever sell any of that stock. I was concerned that those folks that had this opportunity, I wanted to make sure that this opportunity was available to them.

Q Do you have any particular experience in similar transactions?

A In what regard?

Q Corporate mergers, and the effect that might have on shareholders?

A Well, my major area was that I was involved and did lead a dissident stockholders' group so I was very aware of the position of minority stockholders, because I did take over through a dissident stockholders' group the Government Services Savings and Loan in Bethesda, Maryland in 1982.

Q Could you briefly explain how you got involved in that situation?

THE COURT: No, we don't need to go into that. We have got one merger. That's all we can handle.

MR. VIETH: Very well, Your Honor. I have no further questions.

[360] BY MR. CAWLEY:

Q Mr. Baker, was there any pressure from the holding company on you to approve this merger?

A Well, absolutely none. At no time did Mr. Drewer, did any officer of the bank, did any officer of the holding company, did anyone discuss with me and to my knowledge to anyone on the board of directors any specifics, put any pressure directly or indirectly in this situation, none whatsoever.

Q Were you aware of your obligation to the minority shareholders?

A Absolutely. Absolutely.

* * * *

[REDIRECT EXAMINATION]

[362] Q Would it have been important for you to know if the holding company was willing to pay more than $42 per share?

A Absolutely.

Q Would it have been important to you to know whether a financial analysis by the treasurer of the holding company showed that it was a top priority of the company to acquire those shares?

A Yes.

* * * *

Q Would it have been important to you to know that the holding company stood to make money on this transaction at acquisition prices up to $61 per share?

[363] A Yes, all that would have been important information, yes.

Q You answered in response to a question on cross examination that there was never going to be a real market for this stock, as far as you believed, correct?

A That's absolutely correct, yes.

Q That was because of the existence of the holding company and its ownership of 85 percent of the shares already, right?

A Yes.

Q At the time you considered how to vote on this merger, did you—strike that.

There are approximately or at the time there were approximately five million shares of the bank, correct?

A Yes. As far as I understood, yes.

* * * *

TESTIMONY OF MICHAEL C. CONNOR

DIRECT EXAMINATION

[367] Q Good afternoon, Mr. Connor. Would you please state your full name for the record.

[368] A Michael C. Connor.

Q And you are employed by Keefe, Bruyette & Woods, Inc.?

A Yes, I am.

Q Do you know Mr. Jack Beddow?

A Yes, I do.

Q And it's true, isn't it, that Jack Beddow gave you a range of around $42 per share at the beginning of your work on this transaction, isn't it?

A I do not remember precisely the process by which a number was originally presented. I believe I recall that Jack had an idea around the $40 range at some point very early in the discussions.

Q Do you recall your deposition being taken in this case?

A Yes, I do.

Q Do you recall at page 36 of your deposition being asked the following question at line 21: "Question: With respect to your understanding concerning a fair premium, were you given any guidance by the client with respect to a range of numbers that it thought would be fair?"

"Answer: I knew a range was discussed."

"Question: And when was a range discussed?"

"Right from the beginning."

Do you recall that question and answer?

[369] A Yes, I do.

Q And that was correct at that time, right?

A Yes.

Q That's still correct today, right?

A Yes.

Q I would like you to turn in the exhibit book that is in front of you to Plaintiff's Exhibit T. There are two books. One has letters and one has numbers.

A Notice of annual meeting?

Q Yes. And turning to Appendix 3 to Plaintiff's Exhibit T, which I believe are the last two pages, could you put those in front of you?

A Appendix 3. I have it.

Q And Appendix 3 is a letter that bears your signature, right?

A Yes, it does.

Q When you signed that letter, you knew it was addressed to and written for the holding company, right?

A Yes, I did.

Q Your client was the holding company, right?

A Yes, it was.

MR. KEENEY: We have no further questions, Your Honor.

[370] CROSS EXAMINATION

BY MR. CAWLEY:

Q Mr. Connor, you were asked about whether or not some price was discussed. Were you ever given a price that the company, the holding company had decided upon in advance of their contacting you?

A No.

Q Is it common in your business to hear prices expressed by officers or employees of a company that deals with you?

A I have never had a client that didn't have an opinion about the value of his company or a company he was looking at.

Q What effect if any did anything that anybody said to you have on your opinion as to what was a fair price for this transaction?

A None.

Q And why would it not have an effect?

A Well, simply because I am going to arrive at my own conclusion.

Q Was the opinion that you just discussed with Mr. Keeney that you have addressed to the holding company, was that your opinion or somebody else's opinion with respect to what was a fair price to acquire the minority shares?

A That was my opinion, representing the firm of [371] Keefe, Bruyette & Woods.

• • • •

TESTIMONY OF STEPHEN YEONAS

DIRECT EXAMINATION

• • • •

Q And in connection with the transaction, did [372] Mr. Beadow tell you that the $42 price that the holding

company was offering was one that was originated by Keefe, Bruyette & Woods without any suggestion of a number from the holding company?

A No, he never told me that.

Q Do you remember my taking your deposition in this case?

A Yes, sir.

Q Do you remember at page 20, line 12, I asked you this question: "Was it your understanding based on what Mr. Beddow said to you that the $42 number was the number that originated with Keefe, Bruyette & Woods as opposed to being a number that First American Bankshares had decided they wanted to pay, and had asked Keefe, Bruyette & Woods whether it was a fair price?"

"Answer: "My answer is yes."

A That's correct. That was my understanding. I don't recall Mr. Beddow telling me that in specific words. My understanding was it came from Keefe, Bruyette and not from the holding company.

Q That's right. And insofar as you had an understanding wasn't it based upon something you heard from Mr. Beddow?

A Yes.

Q Now, sir, at the January 15th, 1987 board meeting, that's the first time you heard about this merger transaction, [373] isn't it?

A That's correct, sir.

Q And was there some statement made to you at that meeting that the holding company wanted to see this transaction be completed within some relatively short period of time?

A No, sir.

Q Nothing to that sort was suggested? Was there some timetable suggested?

A No, no timetable. I had a feeling obviously that there was some period of time if we were going to approve it in connection with shareholders' approval and board approval, of course I would be involved, but no specific timetable or no pressure that it be done.

Q Do you remember at your deposition refreshing your recollection by looking at a note that you made saying something about it's necessary?

A Is that up here?

Q I don't have that. I could give it to you. Let me get the exact—

A Because I made so many notes. You have most of them.

Q At page 43, line 15, I could get you the note—

A No, you can just read it to me.

Q I asked you, "How about the next line, do you know [374] what that means?

Answer: "May 1988. It's necessary. No."

Question: "Do you know whether anybody told you it was necessary to complete the merger by May 1988?"

Answer: "There was some discussion about the completion of the merger but I can't relate it to this date, but there was a discussion and I don't remember what date."

Question: "Was there some date given by which the holding company wanted the merger to be completed?"

Now, there was an objection and some discussion, but your answer on page 45, line 8: "The way the question came up was that there was discussion as to the holding company that if a decision could be reached on the merger at a planned date, it would be desirable."

Question: "It was desirable from the standpoint of the holding company?"

"Yes."

Do you remember that testimony?

A You want to just read that back to me again?

May I see that? Because I don't remember saying there was a planned date.

Q What I had in mind, Mr. Yeonas, was on page 45 about a third of the way down.

A Right. Just let me see it.

(Law Clerk handing document to witness)

[375] THE WITNESS: It was desirable from the standpoint of the holding company to have a planned date, yes, but there was no planned date given.

BY MR. HASSETT:

Q Did you first learn about Keefe, Bruyette & Woods' compensation arrangement at the stockholders' meeting?

A Yes, sir.

Q When you did learn about it, did you think it was something that should have been disclosed to you when you were acting as a director on the matter?

A Yes, sir.

Q At the January 15th meeting, did you ask Mr. Beddow whether if the board of the bank retained its own financial adviser and the bank's own adviser said that the stock was worth more than $42, would the holding company pay a higher price?

A Yes, I did.

Q And did he say no?

A Yes.

Q Now, sir, you believed that the market price of around $33 was not a fair price to pay the minority stockholders in this transaction, didn't you?

A $33 was not a fair price? That's correct.

Q You felt there had to be some price above that, and the question that the board had to decide was how much [376] above that, didn't it?

A That's correct.

Q Now, at the discussion, you were present on the 29th of January, when Mr. Connor addressed the group of directors?

A Yes, sir.

Q Let me ask you this. Look in the book with the, I think that's the one with the letter tabs, and look if you would at Tab Z. Look in particular if you would at, I think it's on the bottom of the page, it has the number 3003, and it's entitled, "Peer Group Stock Prices."

A I have it, sir.

Q Was that, Mr. Yeonas, a handout that Mr. Connor gave you at that January 29 meeting?

A Yes, sir.

Q And those banks that are listed, they are the banks that he presented to the group of directors as a peer group of stock prices for the First American Bank of Virginia?

A That's correct.

Q Look if you would at just a couple of pages before that, 3001, called "Peer Group Ratio Comparison."

A I have it.

Q That's one of the charts that Mr. Connor gave you, too?

A Yes, sir.

Q Does that show over on the right side up at the top, [377] does that show that the peer group stocks were trading at multiples of book and earnings that if they were applied to the book and earnings of First American Bank of Virginia, would have produced prices much higher than $42 a share?

A If they were applied to them.

Q If they were applied, they would have yielded prices much higher than $42?

A Yes. Just a mathematical number.

Q Now, Mr. Connor told you at that meeting some reasons why he believed those shouldn't be applied, is that right?

A That is correct.

Q And were those reasons the market price of the bank stock, the limited volume of trading on the bank stock and these other companies had the possibility of control available but that wasn't available here?

A That was among the reasons, yes, sir.

Q Were there any others that you remember?

A I think those were the major ones, from him.

Q Now, sir, was there—after Mr. Connor left, there was discussion among your group, was there not, as to whether you should hire your own adviser to address the same question?

A Yes, sir.

Q And was there discussion among your group for you [378] to hire an adviser to act on behalf of the bank, it would be expensive and take a month or two?

A That's correct.

Q But in fact nobody at that meeting had any information before him, him or her at the meeting that showed how much it would cost or how long it would take? Isn't that right?

A Not any specific figures.

MR. HASSETT: Thank you, Mr. Yeonas.

CROSS EXAMINATION

BY MR. STUMP:

Q Mr. Yeonas, what was the reason at the meeting on January 29th that the executive committee decided not to go ahead and hire somebody else to arrive at another opinion of the price fairness?

A Because in our judgment the price was very fair at $42 a share; and we came to that conclusion for the following reasons: number one, was that the majority of the subscription rights at $30 a share were not purchases; number two, I personally purchased stock in May of the year before at $32.50 a share. So I was making a substantial profit even on that individual purchase. Number three, that I was aware of the experience in Maryland. The holding company had made an offer in Maryland, which was rejected. Then the holding company continued to buy stock from the shareholders at a lower price, [379] and I did not want to see our shareholders in that position.

In addition to that, I felt that Mr. Clifford directed the bank and not the 15 percent stockholders, and that the best thing that we could do for them was to get them the price after I determined in my judgment or Mr. Beddow gave me the impression that we were not going to get a higher price.

Q Was it also your opinion, or did you have an opinion as to whether this transaction was beneficial to the bank?

A Yes, sir.

Q What was that opinion and what were your reasons?

Q Well, number one, it would improve efficiency. Number two, it makes sense from a long range strategic viewpoint. They have First American Bank of Maryland, First American Bank of the District of Columbia, and other banks. The ultimate goal would be obviously to consolidate them all as soon as possible.

Q In deliberating on this proposal, Mr. Yeonas, whose interests were you trying to protect?

A The minority shareholders.

Q How long have you been on the board of First American and predecessor banks?

A 26 years.

Q And have you had other business experience?

A Yes, sir.

[380] Q You sit on any other boards, sir?

A Washington Gas Light Company, Dart Drug, Washington Mutual Investors' Fund, American Funds Tax Exempt Series One.

Q Were you one of the members of the board or the executive committee of the board who raised the subject of possibly getting another opinion?

A Yes, I did, because my motivation, I wasn't interested so much as whether the price was fair when the meeting started. I was interested in determining whether we could get more from the holding company. That was my first objective. When I found out I couldn't do that then we got involved with a discussion about what's fair.

Q Then to start with, as I understand it, the beginning or the opening of the meeting, you thought you had three choices, yes, no or bargain; is that right? That is yes, no, or get—yes on this price, no on this price or get a better price?

A I felt the choice—yes, that's correct.

Q Now, how did you determine that the get-a-better-price option was not open?

A Number one, by asking Mr. Beddow, and number two, by keeping in mind what the experience was with the First American Bank of Maryland. I felt powerless, frankly, it's very clear that I could not influence the merger, which I was personally opposed to. So any discussion about the merger [381] or proxy statements or annual reports were to me meaningless. I had to do it because of Virginia law. I raised that question at the meeting, and I was told as a matter of fact, I think it was Janis about a phantom corporation law would not permit us to do anything to prevent it.

Q Well, the board had to approve it, did it not?

A Right. But we could not prevent it. It was merely a mechanical thing.

Q Once your choice became yes or no, have you listed the considerations that caused you to say yes?

A Yes and no to what?

Q To whether the $42 price would be approved by the board of directors?

A Well, it was influenced by many factors. Number one was the Keefe, Bruyette report. Number two, when they came to the meeting, I asked them questions. Other members of the executive committee asked them questions. I was satisfied with the answers that they gave, and as I stated earlier, I was influenced by the fact that people did not buy the stock at $30 a share earlier.

Q Mr. Hassett asked you if you knew about the fee arrangement or reliance limitations at the time you voted. Now that you know about them, does it make you—does it cast doubt on your vote, or do you still come to the same conclusion?

[382] A I still come to the same conclusion.

MR. STUMP: No further questions.

BY MR. CAWLEY:

Q Mr. Yeonas, regardless of whether you personally wanted to have the merger take place, your judgment was

that you had to decide whether the price was fair? Isn't that right?

A That's correct.

Q And your judgment was that the price was extremely fair or very fair?

A It was not extremely fair. It was not very fair. It was fair. As far as I was concerned, I didn't think about it any further. I didn't like the idea that I had to decide whether it was fair, so I wouldn't think about the other questions.

Q But you did make that decision it was fair?

A Yes, sir.

MR. CAWLEY: Thank you.

REDIRECT EXAMINATION

BY MR. HASSETT:

Q Mr. Yeonas, you referred to your experience in the First American Bank of Maryland. This played a role in your decision, is that right?

A Yes, sir, that was one of the factors.

Q In that case, didn't the—the holding company had [383] made a proposal of a freeze-out merger to its Maryland subsidiary in 1985 at $30 a share, is that right?

A Correct.

Q And did the board there hire its own financial adviser?

A I'm not sure. I believe they did but I'm not sure.

Q In any event, the board there took the position that the $30 price was too low, didn't it?

A Yes, sir.

Q And the holding company then didn't make any—they withdrew their offer? Is that right?

A Correct.

Q Didn't the holding company later offer $42 to the Maryland Bank?

MR. STUMP: Your Honor, objection to what occurred later.

THE COURT: Objection overruled. I think it has come out—

THE WITNESS: After they continued to buy shares for less than $30, they did later pay $42 but in the interim they bought shares for less than $30.

BY MR. HASSETT:

Q When Mr. Beddow told you that the holding company wouldn't pay any more than $42, did you understand him to be negotiating with you, with he acting on behalf of the holding [384] company?

A Not negotiating with me, no, sir.

Q When he told you that the holding company wouldn't pay more than $42, did he tell you anything about this study by Mr. Scoffone showing that the transaction would be profitable to the holding company at $61?

A No, sir.

• • • •

INTRODUCED DEPOSITION TESTIMONY OF JOEL T. BROYHILL

[385] Q I will begin at line 3: "Question. Was there any discussion at the January 29, 1987 executive committee meeting concerning whether the holding company would offer more than $42 per share for that stock?

A I don't recall any discussion as to speculating how much further they would go. I think as one particular member, we talked about an appraisal of $42. Was that fair. I used the word generous. I thought it was. How much we could squeeze out of a potential buyer, $42, $43, $44, who knows. In my lifetime of investments in buying and selling properties, I never tossed and turned in my sleep as to how much more I could squeeze out of somebody. How much the turnip would bear. If it is fair, it's fair, and I thought that was fair and I voted for it."

MR. MERNICK: Turn if you would to the next page, [386] page 92, line 18:

BY MR. MERNICK:

Q The question: "Putting aside whether Mr. Beddow was singled out, did anybody raise the question at the meeting whether or not the holding company would pay more than $42 per share?

A I don't recall because that wasn't a pertinent point to me. As I explained a moment ago, how much further they would pay, I don't know, and I don't care. I think that was a fair and generous offer, and I don't like to speculate on how much more you could horse trade and squeeze out of something. So to me that wouldn't have been a pertinent point of the discussion.

Q Is it your testimony that if for example the holding company while offering $42 was willing to pay $60 per share, that would not have been important to you?

A I would have lost my respect for the holding company and the sincerity of this offer if I felt that they were doing that."

MR. MERNICK: Would you turn, please, to page 106. I will begin at line 6.

BY MR. MERNICK:

Q "Let me make sure I understand your answer. Is it your testimony that if you had hired a second appraiser to evaluate the stock on behalf of the board and they had looked [387] at all of the same information Keefe, Bruyette looked at, that they had to have come up with the same figures?

A That's correct.

Q And that no reasonable investment banker would have come up with a different figure looking at the same data as Keefe, Bruyette, is that right?

A That is correct, that to acquire this number of shares of stock."

• • • •

[388] BY MR. STUMP:

"Q So that was not important to you?

A I thought it was a fair offer, and I voted on that basis."

MR. STUMP: Now, the next excerpt was at 106, line 6. Let me ask you to go behind that to page 104 at line 12.

THE LAW CLERK: All right.

[389] BY MR. STUMP:

"Q You would not have favored the board hiring its own investment banker?

A No.

Q And why is that?

A Because I felt we had sufficient detailed information as to how they arrived at the value, and we didn't need any further information, we knew the book value. We knew just as well as they did the appreciation of the value, the land. We knew what other bank stock was selling for. They had described that to us. We didn't need any affirmation of that information because we had a pretty good understanding of what that information was ourselves. So we didn't need another appraiser to—I didn't anyway—feel that I needed another appraiser to come up with the same information, to arrive at what? Some methodological value—some methodical value of the stock? I thought this was a very generous offer and I was satisfied with it."

MR. STUMP: No more questions.

THE COURT: Mr. Cawley, any that you have that Mr. Stump didn't ask?

MR. CAWLEY: Excuse me just a minute, Your Honor.

Line 88.

THE LAW CLERK: Page 88?

MR. CAWLEY: Yes, excuse me. Page 88, line 11.

[390] BY MR. CAWLEY:

"Q You told me you believed it was your duty to obtain a fair price. Let me ask the question differently.

A A fair price, yes. You asked me what a fair price was. It's a broad term fair, but I would think that as I answered before, at least more than they would get on the market for it and certainly give them a good return to what they had invested in the stock but as far as the highest price obtainable, I would never know what the highest price obtainable was. We never know in any kind of transaction what the highest price available is. We never will know, and what is fair is fair to who and to what. I thought it was a very generous offer.

Q Now, when you say generous, that means fair?

A It means generous.

Q On what did you base your view that this was a generous offer?

A I have been a stockholder of this bank for 20-some years and watched the market value of the stock. I had seen the dividends. I had seen the increase in value of the stock. And I felt that based on 22, 24 years that I had been a member of that board, and being an investor myself, I thought that was far more than generous. The value of that stock, the book value was around $30-plus or minus at that time. We know that the real estate had some appreciation to it [391] depending on who bought the real estate at what time. This is a very questionable thing when it comes into saying who will pay what for what building at what particular time. But you approximate the past as best as you can, and I think for a liquidation value of that stock, $42 was a very, very generous offer."

* * * *

INTRODUCED DEPOSITION TESTIMONY OF SIDNEY O. DEWBERRY

"Q Did Mr. Beddow say anything at that time in the meeting relating to the merger?

A I recall him saying one thing during the meeting.

Q What was that?

A That was that the sole right of a minority stockholder after the merger would be to receive this $42 in cash. I recall that coming from him."

MR. MERNICK: Would you turn please to page 68.

THE LAW CLERK: All right.

MR. MERNICK: Line 17.

[392] BY MR. MERNICK:

Q What else do you remember about the discussion about the merger at the February 12th meeting?

A Well, when you go back to January 1987 and February 1987, it's hard for me to remember which discussions took place at which meeting. I do know that at the February meeting the board of directors approved a resolution or some motion. I am not sure it was a resolution, some motion recommending that this $42 be accepted and I'm sure there was a lengthy discussion because this was a pretty big deal. But I cannot recall other than the fact that it was on my mind, should we have another appraisal. Was $42 a fair price? And confirming in my own mind that there was no, absolutely no other alternative here. The majority stockholders wanted this merger to take place and at the annual meeting was going to vote on the merger. They had the votes. There was nothing that we could do about it. Realizing that, I guess in that 30-day period between the two meetings, maybe 27 days, whatever it was, it dawned on me that there was no other choice. There was no other solution here on that so the only thing remaining was to decide whether or not to recommend it. And after deliberating on it, I felt like it was probably in the best interests of all parties involved. The minority stockholders as well as the majority stockholders as well as the bank as well as the holding company to let the merger go [393] forward as long as the price was a fair price."

* * * *

MR. MURPHY: Starting with line 1.

BY MR. MURPHY:

"Q Was there any discussion in that meeting as to what duties or obligations you or the other directors had with respect to the minority shareholders?

A I clearly understood my obligations. I don't recall there being a discussion.

Q What did you understand your obligations to be?

A To see that the stockholder got a fair price for their stock.

Q Which stockholders?

A Minority stockholders."

MR. MURPHY: Would you turn, please, to page 71, line 15.

BY MR. MURPHY:

"Q I take it that given what you described as your concerns in that February 12th meeting that you concluded in your own mind that a second appraisal was not necessary, is [394] that correct?

A Yes.

Q Please tell me what it was that you heard that convinced you that a second appraisal was not necessary?

A That the executive committee had deliberated as to whether or not it was necessary and reviewed the procedure which the appraisal by Keefe, Bruyette & Woods, whatever their name is, had used in arriving at it, and my respect for the business acumen and judgment of those directors. I was happy with their—I mean not happy—I believe they exercised due diligence in arriving at that recommendation. So I was able to accept that recommendation.

Q Did the expense of a second appraisal have anything at all to do with a decision not to get a second appraisal?

A Not in my mind it didn't."

* * * *

INTRODUCED DEPOSITION TESTIMONY OF CHARLES T. LINDSAY, JR.

"Q By the time the January 15, 1987 board meeting concluded and the discussion had taken place about the merger, [395] did you understand that the $42 price had been established by the holding company or that it had been established by an outside consultant, or did you have no understanding of that point?

A Oh, certainly it was very clear that an outside consultant had determined that this was a proper figure.

Q That was clear by the time the January 15 meeting was over?

A I don't know when that time was. Again, I am not sure, because at one point, well—go ahead.

Q At one point what?

A Well, maybe you will get to it. I was present when the consulting firm made a case for the $42 as being extremely fair.

Q They came in and met with somebody, some group of representatives at First American?

A Right. And that was later than this.

Q They came in to make a case for the $42 price, is that right?

A Yes.

Q And that occasion, was that a meeting with the executive committee?

A Yes.

Q Plus Mr. Broyhill?

A Yes.

[396] Q Anybody else present besides the executive committee and Mr. Broyhill?

A That's it."

MR. MERNICK: That's all I have.

MR. MURPHY: Court's indulgence one minute, Your Honor.

If you would, please, turn to page 62.

BY MR. MURPHY:

"Q Am I correct then that you ultimately concluded that $42 was the best possible price that could be gotten for the minority shareholders?

A Yes.

Q That's why you voted for it?

A Yes."

MR. MURPHY: Turn to page 67, please.

BY MR. MURPHY:

"Q The meeting on the 29th of January was a meeting attended by Keefe, Bruyette & Woods?

A To my recollection, that's right.

Q As best you can recall, what was said at that meeting and by whom?

A Well, again I focus on Mr. Broyhill, the kind of person he is with the integrity that he has and again his holdings. It was obvious that he was going to be—I am looking to him as a key player here. He stated emphatically [397] at least once that he was concerned for the little old lady in tennis shoes and that's a direct quote, that he represented a lot of people in the community and that it was incumbent upon him to absolutely get the very best price possible. And he made some reference to the fact that he was a significant shareholder and a kind of light way but that he obviously had a personal stake in it as well. But you know, a lot of people, his being a congressman, they had followed him there."

MR. MURPHY: Page 71, please, starting with line 8.

BY MR. MURPHY:

"Q Do you recall what Keefe, Bruyette's conclusion was with respect to the $42 price?

A I just—what I can remember is essentially the word fair, extremely fair.

Q Fair to whom?

A To the minority shareholders."

MR. MURPHY: Line 18.

BY MR. MURPHY:

"Q Did you understand it was Keefe, Bruyette's job to determine whether or not the $42 price was fair to the minority?

A I would say yes.

Q And therefore you understood that when Keefe, Bruyette said the price was fair, they meant it was fair to the minority.

[398] A To the minority, yes."

• • • •

INTRODUCED DEPOSITION TESTIMONY OF GEORGE W. JOHNSON

"Q Could you tell me about the subsequent dialogue that involved Mr. Beddow.

A In the discussion of the desirability of the merger, whether the merger was something that was good for all parties, Mr. Beddow was questioned as to why the holding company desired to achieve the merger.

Q Who asked him that question?

A One of the board members. I can't remember which one.

Q What did Mr. Beddow say?

A In general that it was a matter of convenience and that it would clean up a number of technical matters. That's about all that I recall.

Q So when you voted in favor of the transaction, your understanding as to why it was desirable, at least from the [399] holding company's standpoint was that it was a matter of convenience and that it would clear up a number of technical matters?

A Yes.

Q Did you have an understanding at the time you voted as to why it was desirable from the standpoint of the First American Bank of Virginia?

A My concern as a board member in making the judgment of the desirability of this was really addressed to the stockholders, the interests of the stockholders.

Q Am I right, sir, that you had no understanding as to why the transaction was desirable from the standpoint of First American Bank of Virginia?

A No, I don't recall that."

MR. MERNICK: Would you turn, please, to page 142. I will begin at line 15.

BY MR. MERNICK:

"Q When I asked you whether a price was fair, you said fair to whom? Isn't that right?

A Yes.

Q Did your response to me suggest in order to determine what is fair and answer the question what is a fair price, one needs to ask a further question, fair to whom?

A Yes.

Q Keefe, Bruyette never told you the price was fair [400] to the minority, though, did they?

A Keefe, Bruyette did not make a judgmental statement that I recall of that sort.

Q Now, sir, look again at page 50 of Exhibit 2 and the sentence that follows the sentence we were looking at before reads, 'The price to be paid is about 30 percent higher than the $32.50 per share of which the bank's common stock traded as of February 1987, the last trading date prior to the announcement of the proposal.' Do you see that sentence?

A Yes.

Q Does the fact stated in that sentence tell you anything about whether the $42 price is a high value or a fair price?

A It tells me that $42 is higher than $32.50.

Q But the key question is how much higher than $32.50 is a fair price.

A Yes.

Q That sentence doesn't answer that question, does it?

A No.

Q Look with me if you would at the next sentence. It says, quote, 'In evaluating the fairness of the merger

to the public holders of the bank's common stock, the board was aware that the net book value per share on December 31, 1986, was $33.30, and that the $42 per share that will be paid to the public holders of the common stock represents a premium of [401] approximately 26 percent over the book value of the common stock at such date,' unquote.

That's what that sentence says?

A That's what the sentence says.

Q That sentence doesn't tell you anything either, does it, about what is a fair price?

A Not in and of itself, it doesn't. It certainly contributes to it.

Q Does that sentence in combination with anything else said in this paragraph tell you what is a fair price?

A Not in and of itself, no.

Q What do you think would have to be added to that to permit you to reach a conclusion as to what is a fair price?

A The earnings of the bank, the real estate, et cetera, all of the things that were presented by the investment bankers for consideration."

* * * *

BY MR. STUMP:

"Q Now, sir, at the time that you voted, both in the executive committee and in the board in favor of this transaction, did you have any understanding as to why the transaction was desirable at all for the minority stockholders?

[402] A Yes.

Q What was that, sir?

A That it was a fair price.

Q Consider with me, sir, a minority stockholder who simply didn't care to sell his or her shares, did you form any view as to whether the transaction was nonetheless desirable for that fact?

A Yes. Balanced against the shareholders who did desire to sell their stock.

Q Is it your testimony, sir, that you concluded that the desire of those who did want to sell their stock outweighed the desirability of those who didn't want?

A My conclusion is that in the very same market, this was a very advantageous price."

* * * *

INTRODUCED DEPOSITION TESTIMONY OF LINDA MICHAEL

"Q Was there any discussion among the board as to whether or not the board had the power to prevent this merger?

A There was discussion.

[403] Q And what was the conclusion by the board?

A That there was no power.

Q What was the reason for the board's conclusion that there was no power to prevent this merger?

A I can't answer that. I don't know."

MR. MERNICK: Turning to page 25.

BY MR. MERNICK:

"Q You didn't know the reason at that time?

A No. I just knew that I had no choice.

Q Do you remember who told you you had no choice?"

MR. MERNICK: Mr. Margolius, Ms. Michael's lawyer, adds, "If anybody."

I add, "If anyone."

THE WITNESS: "I don't think anyone told me I had no choice. It was just understood."

MR. MERNICK: Turing next to page 29, line 14.

BY MR. MERNICK:

"Q With such a vote did you believe at the time that such a vote against the merger would have prevented the merger from occurring?

A I personally did not believe that a vote against the merger would prevent it from occurring."

MR. MERNICK: Turn, if you would, to page 30, line 16.

[404] BY MR. MERNICK:

"Q By the time of the consideration of the merger in 1987, were you of the opinion that a vote by you against the merger would be futile?

A Yes."

MR. MERNICK: Finally, turn to page 65. I'm sorry, page 66.

THE LAW CLERK: All right.

BY MR. MERNICK:

"Q Did you have any understanding as to what would happen if you tried to oppose it?

A I had an understanding what would happen.

Q What was that?

A Or could have. Not would. Could is a big difference.

Q What is that understanding?

A If we didn't approve it then they would get a board that would approve it.

Q They, the holding company?

A Um hum."

MR. MERNICK: Thank you.

MR. STUMP: Turn, please, to page 19, line 15.

BY MR. STUMP:

"Q Did Mr. Beddow make any comments about or offer any explanation of the proposed merger?

[405] A I don't really remember. Mr. Beddow never says a lot at meetings. He pretty much stays out of things. But he may have answered some questions. I just don't know."

MR. STUMP: Would you turn to page 31, line 19.

BY MR. STUMP:

"Q By the time of that February 12, 1987 meeting, did you have some understanding in your own mind as

to what your duties were to the minorities shareholders with respect to this merger?

A Yes.

Q And what was that understanding?

A To see that their rights were respected in the price they were paid for their stock."

MR. STUMP: Page 35, please, line 4.

BY MR. STUMP:

"Q Coming forward to the February 12, 1987 board meeting, please describe for me as best you can recall who said what about the proposed merger.

A I thought you were going to do something with your pen there.

Q I thought it was a fair question.

A We received a report of the executive committee and the $42 was discussed as being about $10 more than what the stock was selling for, and we again discussed the same point that we had so many times that there was no market for the [406] stock and because of what Mr. Yeonas commented that we have an obligation to the stockholders who might want to take advantage of this higher price to cash out for stock that has no market, which very much balanced our thinking in the whole situation, because there were two sides to it. Those who didn't want to sell and those who would want to sell.

Mr. Broyhill seemed satisfied, and in my mind, that was a good barometer, because he owned such a large number of shares of the stock. That's my recollection."

MR. STUMP: Page 64, line 3.

BY MR. STUMP:

"Q Or did you rely on the judgment of the other members of the board as to whether that price was fair?

A I relied on the judgment of other members of the board.

Q And are there particular members of the board whose judgment you relied on as opposed to others?

A Some.

Q Who were they?

A Mr. Broyhill, because he had a lot of self-interest in it. He had a lot at stake. Mr. Charles Henry Smith, we have several Smiths, and Mr. Yeonas.

Q Why Mr. Smith and why Mr. Yeonas?

A Well, Mr. Yeonas is kind of the sage of the board. He is very reasonable. He is a nice person. He is looking [407] out for people in general. I respect him. Mr. Smith is a good businessman. And I know him better than others because we both live in Alexandria and sometimes we share rides out to Tysons. So I had an opportunity to visit with him more than others."

MR. STUMP: Thank you.

MR. CAWLEY: Excuse me just one moment, Your Honor.

Page 81, please, sir, line 21.

BY MR. CAWLEY:

"Q You testified I think in answer to a question from Mr. Mernick that you believed it would be futile or would have been futile for the board or for you to oppose the merger?

A Yes.

Q And you nodded your head yes, that is what your testimony was.

A Yes.

Q Okay. Do you believe that this would have been equally futile for the board to oppose the payment of $42 per share as a fair price for the minority stock?

A No, I don't think I felt it futile.

Q Why?

A Because it was a negotiating point. If they had been really unfair about it, we could put up a fight, but we felt that they were being fair.

Q You could have put up a fight about the $42 price? [408] A Right.

Q And obtained a higher price?

A If we felt that it had been unfair, yes."

* * * *

INTRODUCED DEPOSITION TESTIMONY OF E. GUY RIDGELY

"Q Do you know in that vein, sir, why there aren't any minutes of that meeting?

A Of the executive committee meeting?

Q Yes.

A There would have to be minutes of the executive committee meeting somewhere, because I am sure, there had to be because this business of this $42 a share was sprung on us at the board meeting which preceded the executive committee meeting for that day. There was always an agenda of the number of items for the executive committee meeting when it met on Thursday. Are you saying that there are no minutes of that meeting?"

MR. MERNICK: Turn next to page 38.

BY MR. MERNICK:

"Q What it your understanding, sir—let me withdraw that—what was your understanding as of January 29, 1987 at the meeting we have been talking about as to what your duty [409] was as a director of First American Bank of Virginia with respect to this $42 merger offer?

A It is a responsibility as a director to do what I think is best in the situation for the stockholders.

Q I didn't hear the end of the answer.

A For the stockholders.

Q Did you have any understanding as to whether your duty was to do what was best for the minority stockholders or for the holding company or for both?

A Well, in this situation here we are speaking of the minority stockholders' interest.

Q So you understood that it was your duty to do what was best for the minority stockholders?

A What I thought was best, yes.

Q If an analysis of the value of the minority stock undertaken by some consultant who was hired by the

directors had shown that the stock's value was greater than $42, wouldn't it have been your duty, sir, to try to get that higher value for the minority stockholders?

A It was our judgment and my feeling that we didn't need an outside consultant.

Q Could you try to answer?

A If we had employed an outside consultant, if, and the outside consultant came back and said that in our opinion the stock is worth X dollars above $42, would I have felt any [410] different? Yes.

Q You would have tried to get that higher price for the minority, wouldn't you?

A If we paid a consultant to give us information that we apparently needed and felt we needed, yes."

MR. MERNICK: Turning to page 43, please. I'll start at line 10.

BY MR. MERNICK:

"Q Am I right, sir, that as of the meeting we have been talking about, nobody told you what the compensation arrangement was between the holding company and its financial consultant?

A That's the fourth paragraph?

Q Yes.

A That was news to me. I think I read it in the newspaper. I believe I read it in the newspaper not too long ago.

Q Well, now allowing for the fact that is similar to a contingent fee arrangement, isn't it true that this kind of arrangement did give the consultant a benefit in the event that the transaction did go through at the $42 price?

A Gives them a benefit? I think it's obvious.

Q Doesn't that give them some interest in seeing that the transaction does go through?

A But I don't see how they, and this is my now, I [411] don't see how they could see that the transaction went through.

Q Well, couldn't they have an effect on it, sir, by reason of convincing the board of directors of which you are a member that the $42 was fair?

A They couldn't have convinced me at all. Anything that they had said that I didn't agree with, I certainly wouldn't agree with them just because they had said it if I didn't feel that it was good.

Q I'm sure that's true, sir, but didn't they have a financial interest by virtue of the arrangement we have just been looking at?

A I think that's obvious."

MR. MERNICK: Thank you.

MR. STUMP: Go to page 32, line 6, please.

BY MR. STUMP:

"Q In front of you is something that has been marked as Exhibit 2, and the last two pages of that, the last two contained what I understand to be the opinion that the consultants gave to the holding company.

A That looks like to me what we saw.

Q At the meeting at which those consultants were present, they handed this out as best you can remember?

A As far as I can remember, that's what happened.

Q Do you remember the gist of what they said? Did they say something to the meeting generally as to why they [412] thought their opinion was a sound one?

A My recollection is that there was a discussion relative to it being a sound proposal to offer $42, as much as the holding company owned a great majority of the bank stock. I recall some comment, not necessarily by these people but maybe by a director or maybe more than one director, that this represented roughly 40 percent more than what the stock had been selling for, while other banks were getting more. But that it was pointed out that after all we have the majority stockholder here and the banks are getting more if they don't have a majority stockholder. I remember something along those lines as being brought out during the general discussion."

MR. CAWLEY: Page 36, line 2, please.

BY MR. CAWLEY:

"Q Did you yourself, sir, believe that hiring your own consultant on behalf of the board would be an unnecessary expense?

A I personally felt that it was an expense that was not needed. It was a situation where we had a majority stockholder. A year prior to that time, new capital had to be raised in order to equalize the ratios of capital deposits, assets, et cetera. New capital had to be raised and was offered to the existing stockholders at $30 a share. And here a year later the holding company is offering $42 a share. [413] I personally thought it was a generous offer based on that particular situation."

MR. CAWLEY: One more reference: page 40, please, line 11.

BY MR. CAWLEY:

"Q Did the holding company suggest in any way to you or to the other directors that they didn't think you needed to get an outside consultant?

A No, sir, not to me, and not in any of these meetings at which this was discussed."

* * * *

INTRODUCED DEPOSITION TESTIMONY OF GLENN W. SAUNDERS

"Q Mr. Saunders, you understood on February 11, 1987, that Keefe, Bruyette & Woods had been hired by the buyer?

A Yes.

Q And that the buyer's investment banker had rendered an opinion with respect to the fairness of this price, correct?

A That the buyer's investment banker?

Q That the investment banker hired by the buyer had rendered an opinion as to the fairness of this price?

[414] A The investment banker being who?

Q Keefe, Bruyette & Woods.

A Yes.

Q I take it there was then discussion at the board meeting of the possibility of the selling, First American of Virginia, hiring its own appraiser or investment banker to pass on the fairness?

A Yes.

Q Why did you think that was unnecessary?

A After discussion with the executive committee, and I value the opinions of the people that were on the committee, and they had taken the time, had studied the matter and discussed it with them, I was willing to go on their recommendation that they felt the appraisal we had was fair and that if we hired someone else, there would not have been any material difference.

Q Can you explain to me what you mean by if you hired someone else, there would not have been any material difference?

A That they would have gone through more or less the same proces, they would have had the same information available to them that Keefe, Bruyette & Woods had, and assuming Keefe, Bruyette & Woods was a legitimate, honorable, professional, who was making the survey and study that with the same information they would have come to essentially the [415] same conclusion.

Q Why did you believe that if another appraiser or investment banker were hired on behalf of the First American of Virginia, it would not have come to the conclusion that $52 or $62 was a fair price as opposed to $42 Keefe, Bruyette & Woods said was fair?

A As I said before I believe, and as I am more familiar with real estate appraisal than I am bank appraisal, but I believe the ultimate price that an appraiser arrives at is based upon the information that they are given and the factors that they consider and the formulas that they use in determining the ultimate value. There may be two or three various approaches that are used in determining that value and they all sort of

merged together and they came up with their recommendation. I believe, in my understanding I believe still that bank appraisers work more or less the same way and that the same information available which they would have, they would have come fairly close to the same conclusion."

* * * * *

INTRODUCED DEPOSITION TESTIMONY OF HENRY A. THOMAS

[416] "Q Let's come back to the $42 price. With respect to the consultant for whom was the consultant working?"

MR. MERNICK: Mr. Stump asked a clarifying question. "You want to know Mr. Thomas' understanding, then or now?"

I respond, "Then if he had an understanding then."

THE LAW CLERK: "I assume the consultant was working for First American Bank."

BY MR. MERNICK:

"Q That is what you assumed in January 1987?

A I assumed he was working for the First American Bank of Virginia.

Q And so we are clear on the identity of the consultant we are talking about, is it the firm Keefe, Bruyette & Woods?

A Yes.

Q Have you subsequently come to a different understanding as to the identity of the entity for whom Keefe, Bruyette & Woods was working?

A Yes.

Q What is your understanding now?

A It is the holding company.

Q Keefe, Bruyette & Woods was working for the holding [417] company, is that right?

A That's correct."

MR. MERNICK: Thank you.

MR. STUMP: Page 11, line 12.

BY MR. STUMP:

"Q You are a member of the board of directors of the bank, correct?

A Correct.

Q For how long have you served as a member of the board of the bank or predecessor institutions?

A My best recall is 1963.

Q Which of the three predecessor institutions were you affiliated with?

A Alexandria National Bank.

Q How did you come to serve on the board of Alexandria National Bank? How were you known to those and who asked you to serve, if you know?

A I was known to all of the directors of Alexandria National Bank.

Q Through professional contacts?

A Basically, yes.

Q Had you performed legal services for them?

A On occasion with the law firm of Davis & Ruffner. (phonetic)

* * * *

[418] BY MR. STUMP:

"Q What did you learn about the proposed merger at that January meeting?

A That the holding company was proposing a proposed merger, that it would be a cash buy-out and would move forth during the year 1987.

Q Did you learn the specific price at which the cash buy-out was proposed to take place?

A Yes.

Q What was that price?

A $42.

Q That price was specified to you at the January '87 board meeting?

A As I best recall.

Q Was there any explanation as to how that price was [419] arrived at?

A Yes.

Q In general what was the explanation?

A That there was a consultant, there was discussion, it was referred to the executive committee and plus Mr. Broyhill."

MR. STUMP: Page 20, line 11.

BY MR. STUMP:

"Q Which person or entity did you understand had come up with that $42 figure? Let me suggest to you possibilities but you tell me if it is some other person or entity: the consultant, the holding company, the bank or someone else who had come up with the $42 figure?

A The consultant.

Q Did you have any understanding as of the—let me pose two different scenarios to you and tell me if either one of them occurred so far as you know: scenario No. 1, holding company says to the consultant, 'We want to purchase the minority stock and we want to pay $42 per share for it. Tell us if that would be a fair price.' And scenario No. 2, the holding company says to the consultant, 'We would like to purchase the minority shares. You tell us what a fair price would be.'

Is it your understanding if one or the other of those took place, and if so, which one?

[420] A I don't recall.

Q Did you ever have an understanding on that point?

A Please state your question again.

Q As you were considering this merger and how you would vote with respect to this merger, did you ever have any understanding concerning which of these two scenarios had taken place?

A I don't recall.

MR. STUMP: Page 27, line 14.

BY MR. STUMP:

"Q Did you understand in January and February of 1987 as you were considering this proposed merger that you had some duty to the minority shareholders?

A A great deal of responsibility.

Q What was your understanding of that duty?

A That a fair price be arrived at.

Q And how were you to determine what constituted a fair price?

A I think the responsibility of a director requires that he really listen to everything that is put before him with his experience and also the fact that he is also a minority stockholder and to try to establish in his mind a fair price.

Q With that understanding you have just described to me, was that your understanding of both the January and [421] February meetings?

A Yes."

* * * *

INTRODUCED DEPOSITION TESTIMONY OF ROBERT A. ALTMAN

[422] BY MR. MERNICK:

"Q In between the time when the executive committee considered this matter initially in July of 1986 and January 9, 1987 when Keefe, Bruyette reported back to the executive committee, were there any communications at all by you with any of the investors with respect to any of the matters relating to the acquisition of the minority shares of First American?

A No.

Q No communications whether oral or written?

A That's correct.

Q Were there any such communications to or from the investors by any other representative of either FABI or any affiliate of FABI?

A No.

Q Are you certain of that?

A As certain as I can be, yes.

Q How was it that you were certain that others did not communicate to the investors?

A The only people who communicated with the investors were Mr. Clifford and me. I am unaware of any communication that he had with them on this subject. I have already testified as to my own knowledge. No other officer of the company ever communicated with the investors with reference to the affairs of the company. [423] Q As far as you know when did the investors become aware of FABI's plans to acquire the minority interests in First American Bank of Virginia?

A I don't believe any of the investors were advised of this prior to the consummation of the transaction.

Q That would be prior to May 1987?

A Correct."

MR. MERNICK: Thank you. Now, if you would turn back to the beginning of the excerpts, and I will start on page 7, right at the top.

BY MR. MERNICK:

"Q Are you familiar with an entity called First American Bank of Virginia?

A I am.

Q Do you hold a position or office in that entity?

A No.

Q Do you draw any income or salary from that entity?

A No.

Q Do you know who or what owns First American Bank of Virginia?

A I do.

Q Who was that?

A Virginia Bankshares and ultimately First American Bankshares.

Q Do you hold any position in Virginia [424] Bankshares, Inc.?

A I do not.

Q Do you draw any income from Virginia Bankshares, Inc.?

A No.

Q I believe you indicated that Virginia Bankshares in turn is owned by First American Bankshares, Inc., is that right?

A That's correct.

Q Do you hold any position with First American Bankshares, Inc.?

A Director of the board.

Q Are you an officer?

A No.

Q Are you also on the executive committee of that board?

A I am.

Q Do you derive any income or salary from First American Bankshares, Inc.?

A I receive board fees which are turned over to the law firm of Clifford & Warneke.

Q How much are those board fees, please?

A I don't recall exactly. They are approximately $16,000 to $18,000 a year.

Q By whom or by what is First American Bankshares, [425] Inc., owned?

A First American Bankshares is owned by the First American Corporation.

Q Do you hold a position or office in that entity?

A I am the president of that company.

Q Are you also a director?

A I am a director.

Q Do you derive any income from First American Corporation?

A No.

Q You receive no fees for attendance at board meetings, for example?

A I do not.

Q Does First American Corporation have periodic board meetings?

A The board actions are generally taken by consent rather than actual meetings of the board.

Q How about First American Bankshares, Inc., do they have periodic board meetings?

A Quarterly."

* * * *

[428] "Q Had you had any dealings with Keefe, Bruyette & Woods prior to this contact in the fall of '86?

A Yes.

Q What prior experience have you had with Keefe, Bruyette & Woods?

A First Keefe, Bruyette & Woods, in another portion of their business, does ratings of virtually every major bank in the United States' credit ratings. Secondly, we had employed them in connection with the acquisition of the minority stock in the First American Bank of Maryland, which was a transaction we had considered prior to this time. There may have been some others, other times when they were engaged, but I don't recall.

Q You would employ Keefe, Bruyette & Woods in the same capacity with respect to the acquisition of the Maryland Bank stock as you were employing them in this case, is that right?

A That's correct.

Q To perform essentially the same function?

[429] A Correct.

Q By the time you engaged Keefe, Bruyette & Woods with respect to the Maryland transaction, had the holding company made an offer for the minority stock of the Maryland Bank?

A I didn't follow you. Would you state that again?

Q By the time you engaged Keefe, Bruyette & Woods in connection with the Maryland Bank acquisition, had the holding company already established a price or made an offer of a price it was willing to pay?

A I don't recall.

Q Do you recall whether it was the holding company or Keefe, Bruyette & Woods who came up with the price that the holding company was willing to pay for the Maryland Bank stock?

A I don't recall.

Q Do you recall what the price was the holding company was offering to pay for the Maryland Bank stock in that instance?

A In that transaction which predated this Virginia transaction, we were considering a price of $32 per share to the best of my recollection.

Q Did Keefe, Bruyette & Woods give you an opinion with respect to that $32 per share?

A I believe they did.

[430] Q And what was their opinion about that price?

A That the price was a fair price.

Q Did that acquisition take place at $32 per share?

A No.

Q Why not?

A The board of directors of First American Bank of Maryland raised objections as to the price and sought to have us increase the price. We were not willing to increase the price and withdrew the transaction.

Q Approximately what year was that? I should say approximately was date was that? Be as specific as you can.

A It was a couple of years prior to this. I would have to check the records because I could be way off. I don't remember.

Q Did the board of the Maryland Bank have their own investment adviser advising them?

A Yes.

Q Was it the opinion of that investment adviser advising the bank's board that the $32 price was too low?

A Yes."

MR. MERNICK: Turn, please, to page 107, line 9.

BY MR. MERNICK:

"Q Let me pose a question another way just so that I am clear on the answer: two different scenarios and tell me which one of the two happened or that neither happened. The [431] first scenario is the holding company said to Keefe, Bruyette & Woods, 'We are thinking of paying $42 per share. You tell us if that's fair.'

A To the best of my knowledge, that did not occur.

Q The second scenario is the holding company saying to Keefe, Bruyette & Woods, 'We want to buy the minority interest in this bank. You tell us what a fair price would be.'

A To the best of my knowledge, that is what transpired in this case.

Q Were you present when that transpired?

A I was present when Keefe, Bruyette recommended the price of $42 per share. I did not participate in the discussion when they were retained and given their assignment.

Q Who did participate in that discussion?

A I believe it was Mr. Beddow. I don't know if he had others either on his phone with him or in a meeting with him. I believe he did it by telephone."

MR. MERNICK: Turn if you would to page 113.

BY MR. MERNICK:

"Q Did you discuss with Mr. Beddow the two-tiered nature of the fee that is embodied in this letter, that is the $25,000 fee for the services performed and an additional $75,000 if and when the merger were consummated?

A Yes.

Q You were aware of that aspect of Keefe, Bruyette's [432] fee?

A Yes.

Q Did you approve that aspect of it?

A Yes."

MR. MERNICK: Turn, please, to page 151, line 9.

BY MR. MERNICK:

"Q Was Mr. Drewer told that Keefe, Bruyette had come up with a $42 price as opposed to FABI coming up with it?

A Yes. I think that Mr. Clifford mentioned at the time that we had been thinking about a price of $40 per share but that we were prepared to accept the recommendation of Keefe, and were prepared to proceed to pay $42 per share."

MR. MERNICK: Go to page 155, please, line 9.

BY MR. MERNICK:

"Q Was there any discussion between Mr. Drewer and Mr. Clifford or anybody else from FABI about FABI's willingness to or lack thereof to pay a price higher than $42 per share?

A I think Mr. Drewer understood that $42 was the price.

Q What leads you to that conclusion?

A Because our past practice had been in the case of Maryland that when the board had sought to have the price increased we declined to proceed with the transaction."

MR. MERNICK: Page 162, please.

[433] BY MR. MERNICK:

"Q Do you recall any subsequent discussion with Mr. Drewer after the Altman, Clifford, Beddow, Drewer meeting of the—"

MR. MERNICK: I'm sorry. That's page 162. I'm at line 7. The answer begins at line 20.

BY MR. MERNICK:

"Q Do you recall any subsequent discussion with Mr. Drewer after the Altman, Clifford, Beddow, Drewer meeting of the 13th? Do you recall any subsequent discussion with Mr. Drewer about any aspect of the merger?

A I don't recall the luncheon. What I would say to you generally is that from time to time Mr. Drewer

would inform me how the matter was proceeding, that is, that the matter had been taken up by the board, that the board had referred it to the executive committee, that Keefe, Bruyette was being asked to appear or did appear, that these were questions that had been asked of Keefe, that the board was impressed with their analysis, that sort of thing; status reports as the matter progressed.

Q And this was in the time frame between January 13th and February 12th, the board's meeting at which—

A And thereafter. It went right up until the time the matter was concluded.

Q With what frequency did Mr. Drewer give you the [434] status reports?

A Whenever there was an event that warranted mention. After the board meeting, here Mr. Beddow would have told me what was happening, or after the executive committee meeting. I don't know what these dates were and I didn't have any documents that indicated when they were.

Q In addition to the status reports you were receiving from Mr. Drewer, were you also receiving status reports from Mr. Beddow?

A Yes."

MR. MERNICK: Page 167, please, at line 16.

BY MR. MERNICK:

"Q Did you ever discuss with Mr. Drewer the advisability or lack thereof of the bank's board hiring their own investment investor to review this transaction?

A I know that he reported to me that the bank decided not to hire an investment banker."

MR. MERNICK: At 168.

BY MR. MERNICK:

"Q When was it that he reported this to you?

A February or March, somewhere in there.

Q Contemporaneous with the bank's and the executive committee's decision not to hire its own investment banker in one of those periodic status reports?

A Yes. There was no status reports at any regular [435] interval. Just as we were talking he would advise me what was going on, and he would say that the board had determined that they did not have the need to hire another investment banker.

Q So whenever that decision was made, he thereafter reported it to you?

A Yes."

MR. MERNICK: Page 202, please, line 22.

BY MR. MERNICK:

"Q Am I correct that the holding company presently is in the midst of an analogous transaction to the Virginia transaction with its Maryland subsidiary, a merger that will eliminate the minority interest of the Maryland Bank?

A That's correct.

Q Am I correct that the price there is also $42 per share?

A Yes."

MR. MERNICK: Page 204, line 19.

BY MR. MERNICK:

"Q Does the holding company have an investment banker in connection with the proposed Maryland transaction?

A Yes.

Q Is it Keefe, Bruyette & Woods?

A Yes."

MR. MERNICK: Thank you.

[436] MR. CAWLEY: Page 60, line 22.

BY MR. CAWLEY:

"Q I would ask you to turn, please, to page 3 of Exhibit 25. Focus in on the paragraph titled 'Summary,'

the first sentence of which reads quote, 'It is my opinion that the acquisition of a minority shares of First American Bank of Virginia should be a top priority for the company,' end quote. Do you see that?

A I see the language.

Q Did you discuss that summary or conclusion with Mr. Scoffone?

A I don't believe that I did. It was an opinion that he offered, and it was not requested, and it was not a matter of any particular significance to me.

Q Why was that?

A Mr. Scoffone's capacity is to provide me with the financial analyses that I had requested, and he was not in a decision-making or advice-giving capacity with the holding company as related to this transaction, so I did not attach any particular significance other than to the numbers which he provided."

MR. CAWLEY: Page 62, line 19.

BY MR. CAWLEY:

"Q Putting aside this particular instance in Exhibit 25, when Mr. Scoffone performed these types of analysis, was [437] it generally within his authority to determine the price levels or potential price levels at which the analysis would take place?

A Mr. Scoffone had no authority to determine price levels. Mr. Scoffone was supplying us with financial analyses as to the implications and relationships of prices for the cost of stock and how it related to the cash flows, total cost of acquisition and the like. He was simply either providing us with specific numbers that we had requested or was providing us with numbers that he thought would give us a sense of the implications, financial implications of the transactions."

(Pause)

MR. CAWLEY: Your Honor, I am also cutting back now that I know what they have brought out.

Page 80, please, line 4.

BY MR. CAWLEY:

"Q Would you agree with me, Mr. Altman, that Mr. Scoffone had concluded that in each of the four prices for which he was performing his calculations, there would be a positive net income result to the corporation if the acquisition were to take place?

A I think the document speaks for itself given the assumptions that are made.

Q Do I correctly understand the document that even in [438] an acquisition price of $61, there would be an increased net income to First American Bankshares, Inc. of $299,000 if the merger were to take place at that price?

A Well, that indicates an acquisition cost of $45 million, and one would hardly invest $45 million to generate $299,000 in income."

MR. CAWLEY: Page 88, line 17.

THE LAW CLERK: I don't have a page 88.

MR. CAWLEY: Your Honor, this is one of the areas we have designated. Apparently it wasn't in the book that has been supplied by the plaintiff's attorneys.

THE COURT: Have you got a book that does have it?

(Marshal handing document to the law clerk)

THE LAW CLERK: All right.

MR. CAWLEY: Page 88, sir.

BY MR. CAWLEY:

"Q Mr. Altman, did you attend a meeting on July 17th, 1986 of the FABI executive committee?

A Yes.

Q Was there discussion at that meeting of the potential or proposed acquisition of the minority interest of the First American Bank of Virginia?

A Yes.

Q Are the minutes correct on page 3 that you were the member of the executive committee who suggested that

[439] consideration be given to acquiring that minority interest?

A I don't recall independent of the document, but I believe the document is accurate.

Q When was the decision to acquire the minority interest actually made?

A A decision was made in executive committee meeting January 1987, about six months later."

MR. CAWLEY: Page 99, please, line 6.

BY MR. CAWLEY:

"Q Mr. Altman, following the July 17, 1986, executive committee meeting at which you proposed at least consideration of the acquisition of the minority shares of the First American Bank of Virginia, what was done next with respect to pursuing that suggestion?

A We concluded that we needed the services of an independent expert who could advise us as to how to proceed. We consulted both with our counsel, Hunton & Williams, as well as the investment banking firm of Keefe, Bruyette & Woods, and determined the structure and manner in which we would go forward with the acquisition."

MR. CAWLEY: Page 100, line 2.

BY MR. CAWLEY:

"Q Did you prior to consulting with Keefe, Bruyette & Woods, consider any other investment banker as a consultant in lieu of Keefe, Bruyette & Woods?

[440] A We undoubtedly use various investment banking houses but we determined to contact Keefe, Bruyette because they were to our knowledge regarded as the premier banking house that specialized in banking properties."

MR. CAWLEY: Page 105, line 14.

BY MR. CAWLEY:

"Q Keefe, Bruyette recommended a higher price than $42 or a higher price than someone on the executive committee had in mind?

A Keefe, Bruyette recommended $42, which was a higher price than certain members of the executive committee had in mind when we had our discussions with Keefe, Bruyette."

MR. CAWLEY: Page 121.

BY MR. CAWLEY:

"Q As best you can recall, what was said and by whom at the January 9th executive committee meeting with respect to the Keefe, Bruyette & Woods portion of that meeting?

A The Keefe, Bruyette people came into the office where the committee was meeting. I don't recall exactly who said what. Mr. Clifford was chairing the meeting and would have asked them to present us their findings. Mr. Connor or Connors—Mr. Connor spoke on behalf of Keefe. He advised us that they had completed their analysis, that they had looked at the financial condition of the company and other relevant factors and would recommend to us that we pay [441] a price of $42 per share.

Q $42?

A $42.

Q And the presentation at that January 9th meeting by Keefe, Bruyette & Woods by Mr. Connor is the first time you heard the $42 figure as the recommended price, is that correct?

A That's correct.

Q You had not previously heard that figure"—page 122—"either from Keefe, Bruyette & Woods or from anybody at FABI or its affiliates, is that right?

A I know I did not hear it from anybody at Keefe, Bruyette. It's conceivable that Keefe, Bruyette had told Mr. Beddow that this was their recommendation and he had passed it on to me, but I don't think that happened. I am speculating. I believe that they came into the meeting and advised us that they would recommend a price of $42 per share and would be glad to give us a written opinion to that effect.

Q Is it your testimony that prior to the January 9th meeting, there had not emerged in the executive committee a consensus that $42 was the price that ought to be paid for the shares?

A There had not emerged any consensus in the executive committee. In discussions between Mr. Clifford and me, we had been giving serious attention to a price of $38 to $40 [442] per share.

Q Had you and Mr. Clifford shared that $38 to $40 range with anybody else at FABI?

A We may have mentioned it to other members of the executive committee but I don't recall. I believe it was stated at the executive committee on January 9th that that was the price we had in mind. That may have been after Keefe, Bruyette left the meeting.

Q During the portion of the meeting attended by Keefe, Bruyette, after they announced to you their recommendation or conclusion that $42 was the price that ought to be paid, what ensued?

A There was discussion of their analysis. I asked Mr. Connor specifically if Keefe, Bruyette had looked at the real estate owned by First American Bank of Virginia because it had been my understanding that it was being carried on the books at a price below market. They said they had taken that into consideration and they had looked at other factors as well, reserves of the bank, financial condition of the bank and the like. Keefe indicated to us that they felt the $42 a share was a price which no reasonable minority shareholder could object to. And they were prepared to give us an opinion that it was fair if we so requested. They left the meeting at that point.

Q Did they offer to state their opinion in those [443] terms that you just mentioned that $42 was a price to which no reasonable minority shareholder could object?

A They didn't offer to do it.

Q Did not offer to do it?

A They stated that at the meeting but they didn't specifically state, we'll put this in a letter to you. It was not discussed.

Q Did any members of the executive committee react to the $42 price in the presence of a Keefe, Bruyette representative?

A I don't recall. I believe that at that meeting Mr. Clifford advised the members of the executive committee that we felt a somewhat lower price was indicated, but I don't know if that was actually presented to Keefe while they attended the meeting.

Q You mentioned that you had inquired of Keefe, Bruyette—excuse me—of Keefe, on the topic of real estate valuation.

A Right.

Q What did Keefe tell you they had done?

A They said they had taken that into account in determining what they thought was a fair price.

Q Did they tell you what they had done or what consequences flowed from their having taken that into account?

[444] Q Yes, they explained it generally. What they said, it was reflected in their number, and I don't think they regarded it as a material part of the transaction. I can't tell you exactly how they weighed that in coming up with their evaluation.

Q Did they say to the executive committee at that meeting that the methodology for valuing the real estate was not a material part of that evaluation?

A I don't remember if they stated that or not. I merely raised the subject with them because I understood that to be the case. I thought that would be a matter that would be of interest to the board of Virginia. I wanted to be sure that they had reviewed it, and they advised us that they had.

Q Did they give you any indication at all as to any effect on the book value for example of that valuation of the real estate?

A Well, I think there were various things that would affect book value both positively and negatively. But they—book value had been computed in accordance with generally accepted accounting principles, and they accepted book value computations. These were just other factors they were considering to determine whether it would influence their decision or recommendation.

Q So they did not tell you what effect on book value or market valuation the real estate holdings would have as [445] opposed to the then existing valuation of the real estate holdings?

A There would be various things that would affect book value. If you have an inadequate loan loss reserve, which Virginia did, that would affect book value by inflating it. If your investment portfolio is under water but it is not being stated on the books that way because accounting principles don't require it, that would have a tendency to inflate book value. The real estate would be another way. Book value had been computed and confirmed by Arthur Andersen to be in accordance with generally accepted accounting principles. Real estate was one item that Keefe, Bruyette looked at in addition to the book value computation."

MR. CAWLEY: Page 179, line 12.

BY MR. CAWLEY:

"Q Following the meeting with the Keefe, Bruyette on January 9th, once they left the room, what did the executive committee do or discuss with respect to this proposed merger?

A We discussed the recommendation. We discussed the financial implications of it and the fact that it was somewhat higher than the price we had in mind. There were discussions back and forth as to what we should do, and a conclusion was reached that we should proceed to offer to acquire the minority stock of the bank at $42 per share and to request Keefe, Bruyette to give us a fairness opinion, which you and [446] I have just discussed.

Q Why in view of the opinion of $42 was too high was it decided nonetheless to offer $42 per share?

A Why in view of the opinion that it was too high?

Q You said that some members of the executive committee viewed the $42 price as too high. In light of their opinions, why did you nonetheless decided to go forward and offer $42?

A By our own analyses, we had computed a somewhat lower value for the shares. However, the view was that we had gone to an outside expert to tell us what was thought to be based on their professional analysis, a fair price to be offered for the stock and that this was the price that they had recommended. Having sought that advice, we thought it was appropriate to accept it."

MR. CAWLEY: Page 140, line 9.

BY MR. CAWLEY:

"Q Was there ever any discussion at FABI to which you were a party concerning the steps that the Virginia Bank board would have to take in connection with this merger?

A At the executive committee, we discussed presenting the matter to Mr. Drewer, chairman of the board, and asking him to take it to his board. We did not get into the mechanics of how this board would consider the transaction. I did learn that the matter had been referred to an executive [447] committee, which I think was the committee that had been somewhat modified, but this came up later."

MR. CAWLEY: Line 21.

BY MR. CAWLEY:

"Q Was there any discussion outside the context of the executive committee as to what the Virginia Bank board would or should do with respect to this merger?

A Yes.

Q And what was that discussion?

A As the matter proceeded, I was advised that Mr. Drewer had presented to the board, the board had re-

ferred it to the executive committee or a somewhat revised executive committee, that the executive committee had consulted with Keefe, Bruyette and the matter had been referred to the whole board. I was aware of this general process, but they weren't steps as such that the holding company had directed.

Q Was there any discussion as to whether or not the bank's board ought to set up some kind of independent committee as opposed to having its executive committee review this proposed merger?

A There was no discussion of that to my knowledge."

MR. CAWLEY: Page 153, line 14.

BY MR. CAWLEY:

"Q Was anything said to Mr. Drewer about the need for or the advisability of hiring an independent banker by the [448] First American Bank of Virginia board?

A Not to the best of my recollection.

Q No comment was made on that topic one way or the other?

A This was a matter for the Virginia board to consider."

MR. CAWLEY: Page 159, line 15.

BY MR. CAWLEY:

"Q Aside from Mr. Drewer and Mr. Beddow, who was also a member of the bank's board of directors, have you ever discussed the merger with any other members of that board of directors?

A No.

Q During the meeting with Mr. Drewer on the 13th, was any suggestion made or advice given to Mr. Drewer with respect to how he and the board ought to proceed in the consideration of this merger?

A I testified earlier that this was a matter within the discretion of that board."

MR. CAWLEY: Page 167.

BY MR. CAWLEY:

"Q Let's focus back into the January-February time frame when the First American board was considering the matter. Anything of a similar nature that he discussed with you in January or February?"—

[449] Excuse me. This is out of context. It's referring to Mr. Drewer.

MR. CAWLEY: Go ahead, sir.

THE LAW CLERK: "My impression was that he felt those directors were very knowledgeable, knew the bank well, owned a fair amount of stock themselves, and felt the price was a very good one, and that the matter was likely to be approved by the board."

MR. CAWLEY: We have to read it again, Your Honor, to make it in context, one sentence, line 16.

BY MR. CAWLEY:

"Q Did you ever discuss with Mr. Drewer the advisability or lack thereof of the bank board's hiring their own investment adviser to review this transaction?

A I know that he reported to me that the bank had decided not to hire an investment banker.

Q What comment did you make to him when he reported that to you?

A I don't know that I had a comment. He was reporting to me what the bank had determined to do. And it was not I felt in our place to instruct the board how they should proceed."

MR. CAWLEY: Page 169, line 5.

BY MR. CAWLEY:

"Q And is it your understanding that by virtue of [450] Keefe, Bruyette & Woods doing that"—I believe that is going to appear before the Virginia board—"that Keefe, Bruyette & Woods and FABI agreed that someone other than FABI could rely on the Keefe, Bruyette opinion?

A FABI did not take exception to Keefe, Bruyette going to appear before the board. Keefe, Bruyette presented their opinion and the basis for that opinion for consideration by the board of First American Bank of Virginia.

Q Did Keefe, Bruyette & Woods tell the board that they should rely on its opinion?

A I think that was a matter for the board to decide."

MR. CAWLEY: Page 199.

BY MR. CAWLEY:

"Q Mr. Altman, did you ever suggest any present member of the board of Virginia Bank for membership on that board?

A No."

MR. CAWLEY: Page 197, please, question, line 5.

BY MR. CAWLEY:

"Q Was Keefe, Bruyette & Woods given any instructions at all by FABI as to what they were to tell the bank's board about the degree to which that board could or should not rely on their opinion?

A I never had any such discussion with Keefe to that effect.

Q To your knowledge did anyone at FABI have such a [451] discussion with Keefe?

A Not to my knowledge."

* * * *

BY MR. STUMP:

"Q Did Mr. Clifford say to Mr. Drewer that he thought the $42 offer was too generous?

A He indicated that the $42 was higher than the price that he had in mind, but that he was prepared to proceed because that was the recommendation of the expert that we had retained to advise us in this.

Q Did Mr. Clifford or anybody else at that meeting describe to Mr. Drewer the relationship between Keefe,

Bruyette & Woods and FABI as opposed to any relationship between Keefe, Bruyette & Woods and First American Bank of Virginia?

[452] A We advised Mr. Drewer that First American Bankshares had retained the services of Keefe, Bruyette & Woods to perform the services that we described to him. And I think he understood clearly what that relationship was.

Q Did Mr. Drewer understand that Keefe, Bruyette & Woods was not acting for or on behalf of the First American Bank of Virginia?

A Mr. Drewer understood that Keefe, Bruyette & Woods was an independent adviser, that had been brought in to give us an independent analysis as to the value of the stock and that Keefe had been retained by Bankshares for that purpose."

MR. STUMP: Move, please, to page 156, line 18.

BY MR. STUMP:

"Q Was Mr. Drewer told on the 13th of January that the holding company in fact would not pay more than $42 per share?

A Well, it did not come up that way. Mr. Drewer was the chairman and CEO of that bank and had been for a long time. Mr. Drewer also owned 4,000 or 5,000 shares. He knew very well the value of that stock. We advised him of the process we had gone through. We advised him of the conclusion we had reached and he indicated that he thought the price was a very good price, and he thought that the board would feel that it was a very good price. That's the way the discussion went.

[453] Q Is it accurate that he did not ask if the holding company would pay a higher price?

A I don't think he did ask.

Q And is it accurate that neither Mr. Clifford or anybody else for the holding company volunteered the

information that the holding company would not pay a higher price?

A I don't believe the discussion went that way.

Q You don't believe any such statement in substance was made?

A I don't believe any such statement in substance was made, but I think Mr. Drewer understood that $42 was our price."

MR. STUMP: Page 161, line 5.

BY MR. STUMP:

"Q And by that I don't necessarily mean were you acting as his lawyer. But did you give him any advice of a legal nature such as, don't go telling your friends about this because of 10(b)(5) considerations or anything of that nature?

A Well, I just indicated, we said to him I think at that meeting or sometime around then that this was a matter that should be maintained in confidence at least until a press release was issued because it was a publicly traded stock.

Q Did you give him any advice or suggestions with respect to what the board's duties or obligations were in [454]considering this matter?

A No, we never discussed it."

MR. STUMP: Move, please, to page 186, line 18.

BY MR. STUMP:

"Q Did Keefe, Bruyette & Woods tell the board that the board was authorized by FABI and by Keefe to rely on that opinion?

A Keefe, and FABI by their actions understood that Keefe was going to present their findings to the board of directors of First American Bank of Virginia. Those directors would consider that opinion to the extent that they—

MR. STUMP: Wished to consider—"

THE LAW CLERK: Excuse me. "Wished to consider it in the context of their deliberations."

MR. STUMP: Page 200, line 20.

BY MR. STUMP:

"Q Can you tell me what potential change in the bank's dividend policy was contemplated as a consequence of the merger?

A Well, I don't recall specifically what this sentence was intended to state, but I will tell you generally that Virginia was expanding its asset base faster than its capital would permit. And at various times with our subsidiaries we have contemplated eliminating the dividend since it made little sense to pay the money out in the form [455] of dividends and then be forced by the bank's regulatory authorities to make capital infusions with the tax consequences of these transactions. Although there were minority shareholders outstanding, it was not felt that we should cut or eliminate the dividend, but from an economic standpoint, there seemed to be little justification for continuing to pay out a dividend when the bank did not have adequate capitalization in the view of the regulators. So this may well have been the product of a discussion during which we considered reducing or eliminating the dividend in order to provide adequate capital for the bank.

Q Was that prospective ability to reduce or even eliminate dividend payments one of the reasons why the holding company wanted to effectuate this merger?

A It was one factor.

Q What were the other reasons why the holding company wanted to effectuate this merger?

A Well, there were any number of factors. I am not sure that I can enumerate them all at this point. first, as a general proposition, it is rather unique in United States bank holding company operations for holding companies to have banking subsidiaries where there are minority shareholder interests. Further, this created some

administrative burdens. For example, in the allocation of common expenses among the banks such as in the area of data processing where [456] we had to be particularly certain that the expenses that were being allocated to a bank were, that the allocation was accurate so as not in any way to prejudice a minority shareholder who only owned an interest in that subsidiary.

These kind of efficiencies could have been attained by eliminating the minority."

* * * *

TESTIMONY OF JACK W. BEDDOW

DIRECT EXAMINATION

Q Mr. Beddow, would you please state your full name for the record.

A My name is Jack W. Beddow.

Q And are you an executive vice president and director of the holding company as we have been referring to [457] it, First American Bankshares, Inc.?

A Yes. I am an executive vice president of First American Bankshares.

Q And you are also a lawyer, are you, sir?

A Yes.

Q And you have been employed, have you not, you are a full-time employee of the holding company?

A Yes.

Q You have been employed by that company going back to when it was called Financial General Bankshares, many years ago?

A I first became employed by a subsidiary of that bank, of the holding company in 1970.

Q 1970. And did you in the early 1980's, when some new investors took over control of that company, did you at that time become a director of the holding company?

A Yes. I became a director on April 14, 1982.

Q It is at that time, isn't it, that the name of the company was changed from the Financial General Bankshares to First American Bankshares?

A Soon after that, in August of 1982.

Q Are you also the president of Virginia Bankshares?

A Yes, I am.

Q And that is a 100-percent owned subsidiary of the holding company?

[458] A That is correct.

Q And is it effectively simply, is a vehicle through which the holding company acts in a corporate sense when it deals with its stock in the Virginia bank?

A That is correct. It is a shell company.

Q Now, sir, as a—you are also, are you, you are executive vice president of the holding company, are you, sir?

A Yes.

Q And as an officer and director of the holding company you have fiduciary duties to those, to that group of investors that owns the stock ultimately of the company, do you not?

A Yes, I do.

Q What do you do, protect their interests?

A Yes, I do.

Q And did you in—look if you would, please, in the exhibit book in front of you, the one that has the plaintiff's exhibits, and look if you would for a moment at Exhibit D. It is Mr. Scoffone's memorandum of June 11, 1986. Did you receive and review that memo in or about the midpart of June of 1986?

A I don't—where is that?

Q I am sorry. It is Exhibit D, as in delta.

A I don't find that in either of these books.

[459] MR. HASSETT: I apologize.

(Marshal handing document to witness.)

THE WITNESS: I have the exhibit in front of me now.

BY MR. HASSETT:

Q You received that memo sometime in June '86, did you not, sir?

A Yes, I did.

Q And at the time you received it, did you think that the $40 price that he recommended in that memo was the price for acquiring the stock of the First American Bank of Virginia, the minority stock of the First American Bank of Virginia, was the price that was within the reasonable range that the holding company should pay?

A I think that was at a reasonable range, and I thought that at that time, but I didn't make any firm decision that, yes, that's it.

* * * *

[460] Q After that executive committee meeting of the holding company in July, Mr. Beddow, did you call Mr. Buford at the Hunton & Williams firm for legal assistance in connection with the then-contemplated acquisition by the holding company of the minority stock of the Virginia Bank?

A Yes, I did.

Q It's true, isn't it, sir, that you didn't want the First American Bank of Virginia or its directors to know about the subject of that conversation?

A It was premature to tell those directors at that time, because we hadn't made up our minds to proceed.

Q And so the answer is yes, you didn't want them to know at that time?

A That's right.

Q Now, sir, were you the person who acted on behalf of the holding company in making contact with the firm of Keefe, Bruyette & Woods?

[461] A Yes.

Q And was it the purpose of the holding company in having you make that contact that the company wanted to be in a position to inform the board of the Virginia

Bank that it was proceeding on the basis of advice from an outside professional?

A Our purpose was to seek advice on what price we should offer. At an earlier instance in Maryland, we had made up our minds ourselves on a price. We proposed it to the board. The board didn't seem happy with it; and then we asked Keefe, Bruyette after the fact whether we had acted fairly. They said we had acted fairly, but the board didn't seem happy, so we just backed away from it. When this event came up then in the following year, we decided instead of our making up our mind with a fair price should be to the minority shareholders, we should engage Keefe, Bruyette ahead of time and let them tell us what was a fair price to the minority shareholders, and we would have that information with which to proceed.

Q And did you make the contacts with Mr. Connor to retain Keefe, Bruyette & Woods?

A Yes, I did.

Q Did you, sir, at the time you made that phone contact with Mr. Connor, impart to him your view or the view of anybody at First American Bankshares, Inc. as to what the [462] fair price would be for the minority stock?

A No, I did not.

Q You did not?

A No.

* * * *

[464] Q Mr. Beddow, referring back in your own mind to the occasion when you spoke to Mr. Connor of Keefe, Bruyette & Woods to retain him, you were here in the courtroom, were you not, when you heard Mr. Connor say he believes you did tell him the price?

A Yes, I was here in the courtroom.

Q And I take it you think he is mistaken, do you?

A You asked me whether when I contacted him, I told him the price that we had in mind. I did not tell him at that time. He came to Washington. We had a num-

ber of conversations. Whether through the course of conversations, he came to suspect or to feel what price I had in mind, I don't know. But I did not direct him to find a certain price or tell him we want you to find a certain price.

Q But did you, sir, indicate to him that you or others [465] at the company had a certain price in mind?

A I had no plan to indicate that to him. Whether in the course of our conversations, he guessed that I thought some range of prices, I can't say. If he says he did, then maybe he did. But I didn't intend to communicate such a thing to him.

Q You were present, were you not, sir, on the 13th of January when Mr. Clifford told Mr. Drewer about the plans of the holding company to eliminate the minority?

A I was present, yes.

Q And on that occasion, did Mr. Clifford say to Mr. Drewer that the board of the Virginia Bank ought to be informed at its next meeting of the holding company's decision to proceed and that the board should proceed at appropriate speed after that?

A I can't remember the exact words he used. He did inform Mr. Drewer of the holding company's proposal. He solicited Mr. Drewer's views of it, and then suggested that he inform the board of our proposal at the next board meeting and proceeded to deal with it.

Q And did he suggest, sir, that Mr. Drewer and the board proceed to deal with it at appropriate speed?

A I don't remember the words "appropriate speed." I suggested to him he deal with it.

Q Let me ask you if you remember your testimony at [466] your deposition on page 138, line 9. Question: "Was anything said to Mr. Drewer at the meeting we have been talking about in Mr. Clifford's office on January 1987 as to the time schedule on which Bankshares wanted to proceed?"

Answer: "The only thing that was said was there is a regular board meeting in a few days. We have made

this decision. We think the board ought to be informed of it at its next meeting and that we should proceed at appropriate speed after that."

Question: "Is that something that you said to Mr. Drewer?"

"I probably did not say it."

"Do you know who did say it?"

"I think the chairman in explaining the transaction to him said that."

Do you remember that testimony, sir?

A I don't remember it but if I said it it's probably correct.

Q Now, sir, during the course of the discussions—you are a director of the bank in Virginia, also?

A That's correct.

Q And you are a director, are you not, of the First American Bank of Maryland?

A That's correct.

Q During the course of the discussions among the [467] directors of the First American Bank of Virginia, did you tell them about the memorandum of Mr. Scoffone we just looked at a minute ago, Exhibit D?

A I did not.

Q Did you tell them that you had—did you tell your other directors of the bank in Virginia that you had also received a memo from Mr. Scoffone analyzing the possible price to acquire the minority stock of the First American Bank of Maryland?

A No, I did not.

Q It's true, isn't it, Mr. Beddow, that at none of the meetings at the First American Bank of Virginia with respect to this matter there was any discussion that you are aware of as to whether the merger was in the best interests of the bank?

A I don't recall any specific discussions to this effect. I was aware that it was to the best interests of the bank to have this merger concluded. I think a number of other

directors were. I can't remember a discussion specifically on it.

Q Did you, sir, receive drafts of the bank's proxy statement before it was sent to stockholders with respect to this transaction?

A Yes. I saw a draft of it.

Q And did you discuss those drafts with Ms. Orfe? [468] A I saw a draft of that in Ms. Orfe's office. I looked at it. I did not examine it as an attorney might examine it to see if it complied with all the statutory regulations, but I examined it and gave it back to her.

Q Now, sir, you were aware prior to that proxy statement going out, were you not, that it said that all of the directors had voted for the merger? Is that right?

A Yes.

Q And you knew that the minutes of the executive committee meeting of the bank on January 29th said that those present including yourself had unanimously recommended the transaction; is that right?

A That's right.

Q In fact, is it your testimony, sir, that you didn't vote for either the merger at the February 12th meeting or to recommend it at the executive committee meeting?

A It's my testimony that I was at those meetings; those matters came up for vote. I did not want to influence either group in either way, so I cast no vote. That is, I did not speak when a vote was called for. I sat mute. I was aware as a director, however, that when a director does not expressly vote against or ask to be shown as abstaining, will be reflected in the minutes as having voted for. So the record shows that I voted for, but I didn't speak out on it.

Q In the votes at those meetings, was it a voice vote [469] of all for say aye?

A It was a voice vote at each of those meetings and it was unanimous, except that I sat silent.

Q As far as you know, none of your fellow directors were aware that you were sitting silent rather than—

A That's correct.

Q Was the reason that you did that, that you thought it best that you not influence the directors of the bank in any way?

A I did not want to be perceived as trying to lead the directors in that vote.

Q You thought that it would be best if you didn't do that?

A It was my design from the very beginning not to lead or influence the directors in that matter. When this started, I was satisfied that $42 was a fair price. I wanted the directors to reach their own decision on the basis of their information and their knowledge of the bank as to what a fair price might be or whether $42 is fair; and I didn't want to influence them in that, so I adopted a policy through those meetings of sort of speaking when spoken to. I was there to answer questions, if they had a question to direct to me, and when they directed a question to me, I answered it. Otherwise, I didn't comment.

* * * *

[470] CROSS EXAMINATION

BY MR. CAWLEY:

Q Mr. Beddow, the question was asked why you didn't give the Scoffone memo or I guess memos to the board. Why was that?

A Well, he asked about one memo, the July 11th memo. That memo sets out a range of prices and what the numerical results would be from those prices. To start with, it mentions a $61 price, and those figures and those assumptions establish that a $61 price would be out of the question, would be ridiculous.

Q Why would it be ridiculous?

A Because it shows that it would take $45 million to pay that price, and if his assumptions were all correct,

you would make $299,000 on it. And that is not a reasonable investment for anyone to make.

Q Would that be a return of under one percent?

A That would be a return of under one percent, and a few investments like that and we would be out of business.

Q Now, in fact did that memo recommend $61 or did it [471] recommend some other price?

A It recommended $40, and since we were proposing $42 to the board, it seems to me that if I gave the board that memo, I would be accused of trying to propagandize them on the $42 price. I was staying out of that.

Q Mr. Beddow, did you recommend to the board that they not get an independent adviser?

A I did not.

Q Did you realize that as a director of the bank, you had a responsibility to the minority?

A Absolutely.

Q How did you view that responsibility?

A Well, I viewed that I had a responsibility to see that the minority was treated fairly, that they receive a fair price for their stock; and I think that obligation was fulfilled.

Q Did you attempt in any way to influence any of the directors in how they would vote on the question of fairness?

A I did not.

MR. CAWLEY: I have no further questions. Thank you, Mr. Beddow.

REDIRECT EXAMINATION

BY MR. HASSETT:

Q Mr. Beddow, did Mr. Yeonas ask you the question whether if the board of the Virginia Bank retained an adviser [472] loyal to the minority stockholders and that adviser advised that the stock was worth more than $42, that the holding company would pay a higher price?

A He did ask me that.

Q And did you tell him the answer was no?

A I told him we would not.

Q Was it your understanding, sir, that when you told him we would not, you were acting as a negotiator for the holding company?

A It was my understanding that I was acting as a representative of the holding company at that point and was serving as liaison to the bank, yes.

Q And wasn't that role in conflict with the duty you just referred to in response to Mr. Cawley's question of protecting the best interests of the minority stockholders?

A No, I don't think that was in conflict at all.

MR. HASSETT: I have no further questions, Your Honor.

Plaintiff rests.

* * * *

ARGUMENT ON DEFENDANTS' MOTION FOR DIRECTED VERDICT

[473] MR. STUMP: Your Honor, I respectfully move for directed verdict on Count I of the complaint.

THE COURT: It's close, Mr. Stump, but I think it ought to go to the jury on it.

MR. STUMP: I wish to move for directed verdict on Count II of the complaint. If I may state my reasons, Your Honor.

THE COURT: I think you are entitled to state your reasons on both. I don't want to mislead you and look at you straight in the eye and I think I am—but go ahead.

MR. STUMP: With respect to Count I, if Your Honor please, there were six charges made that survive at the present time in this case to improper statements in Count I. I have heard no evidence in substantiation of any of the charges. Your Honor will remember the charges were that the power of the holding company to elect the board was not disclosed in the proxy materials. That we have listed. And there is in evidence Exhibit T. The reasons that that information is ade-

quately disclosed, the fact that there is not a sentence that says exactly that would not be part of the mix that would be of interest to the average investor.

The information includes the fact that the holding company owned 85 percent of the shares, that there was only one vote per share, that the directors were not elected by [474] cumulative voting—

THE COURT: It may be that all of the allegations of the complaint have not been made out. That is not unusual. I think the real closeness of the case is whether there is any real testimony that they omitted some material, because we don't have a great deal more than the plaintiff's testimony. I think that the safest course is to let it go to the jury. She may be deemed a reasonable person. I don't know that there is anybody who has said she is unreasonable.

MR. STUMP: With respect to Count II, Your Honor—

MR. CAWLEY: Your Honor, before we leave that, I join obviously in Count I for the reason Mr. Stump said and I guess for the reasons we have set out in our motion for summary judgment which is in the file, too. I wouldn't duplicate the motions. I agree with Mr. Stump.

MR. STUMP: I just vouch for the record that the material in our trial memorandum I will offer in support of Count I.

With respect to Count II, Your Honor, the General Assembly has statutorily enunciated the duties of a director of a Virginia corporation, and it is that director's duty to statutorily determine in good faith to make a determination of the best interests of the corporation when he casts his vote, his proposals before the board of directors. Respectfully, there has been no evidence elicited from any [475] director or any other witness that any director did not in good faith exercise his business judgment in the best interest of the corporation in voting the proposal that was before the board of directors on February 12.

In addition, the General Assembly has provided that the directors are entitled to rely on a committee of the board and, therefore, that the members of the board, not only the executive board, were entitled to rely on the committee.

The General Assembly has also provided they are entitled to rely on advisers, attorneys, accountants, and to the extent that they did rely on Keefe, Bruyette, understanding that Keefe, Bruyette had been employed by another party, they were entitled to rely.

Now there is a proviso. It says unless they have knowledge of the fact which would render such reliance unwarranted. There is no evidence in this record that there were facts of which they had knowledge in for that.

In addition, if Your Honor please, I think the evidence is clear that the members of the board all of them who testfied, and we can put them all on if Your Honor would wish, relied on their own opinion that this was a fair offer and a generous offer, and were supportive of it.

The information that they got from Keefe, Bruyette, while comforting and corroborative, was not the base reason for their determination.

[476] It seems to me, if Your Honor please, that in view of what the General Assembly has determined, that this has to be a case in which there is simply no showing that a director could be held liable for violating or breaching his fiduciary duty. On that basis I move for a directed verdict.

THE COURT: Motion denied.

MR. CAWLEY: Your Honor, since I represent the holding company, I have a different basis. I didn't bring my notes up here, Your Honor, because I didn't know you would have us make the argument up here. But, Your Honor, I think we start off with the first point that we know there are no dissenters' rights or appraisers' rights.

We know we are not engaged in an appraisal proceeding before this Court. We are involved in the allegations of breach of fiduciary duty.

The second point is that as Your Honor has indicated, this kind of merger is permitted under Virginia law.

Thirdly, the majority shareholders obviously have a fiduciary duty in some capacities and at some times, but the rule I believe is that when it is operating or managing the organization, and now in this case you recall that there are vigorous allegations that the board of directors of the Virginia Bank had identified obligations which they owed with [477] respect to this transaction. Therefore, this is not a situation where our board merely says we are going to pay $42 and do the deal and that is the end of it.

There is obviously an independent group which according to the plaintiffs, that everyone would admit has fiduciary obligation to consider whether that was fair or not. Therefore, we are not in a sort of dealing situation. We are dealing in a situation where if that is confirmed by that independent group obviously goes forward, and we are allowed as a majority shareholder to vote in our interest and to vote for that. There is nothing wrong with that.

THE COURT: There is testimony that it was not an entirely voluntary thing by the board. That they had no choice. As Miss Michael says, if the board didn't do it there would be a special—she did say this—but there would be a board that would do it pretty soon.

MR. CAWLEY: Your Honor, that is actually not what happened in Maryland obviously. There is no evidence that that would have happened here. In fact, I think the only evidence is that she did say, she did say that, Your Honor, it is one director that did say that—

THE COURT: There were a couple of directors that said they didn't think they had any choice.

MR. CAWLEY: They did have a choice as to fairness. They could turn down the transaction at that price. There [478] was independent judgment rendered. I don't believe there is a fiduciary obligation at all. Secondly, if there is a fiduciary obligation, I think it is a

fiduciary obligation that would have that of a trustee towards the assets of his trust, and there is no guarantee. The duty there is to act responsibly and prudently.

There is no evidence other than that is what the holding company did. It said this, and this is noncontradicted. It wanted to come up with a fair price, so it went out and hired Keefe, Bruyette. Keefe, Bruyette gave them a number. That number wasn't pleasing to some members of the executive committee, but they went up in their calculations to that number in order to go along with it.

So what evidence is there, Your Honor, that this holding company actually breached any fiduciary duty, even if there is a fiduciary duty in the situation?

THE COURT: I think there is a fiduciary duty, and I think there is an element of participating with the directors in the breach of the directors' fiduciary duty that is sufficient to hold the corporate defendants in. The motion for directed verdicts will be denied.

* * * *

PRESENTATION OF DEFENDANTS' CASE
TESTIMONY OF PATRICIA BRAGG

DIRECT EXAMINATION

* * * *

[480] Q And today, what is your job?

A Well, my job right now includes business development for the trust division, custodian administration, operations and corporate trust administration.

Q Do you have anything to do with the bank's operations as it's own registrar and transfer agent?

A Yes, I do, Mr. Stump. In the corporate trust area, we handle the transfer activity and registrar activity for the bank for the stock.

Q Can stock be transferred on the books of the bank without your being involved with it?

A No. Let me explain how that works. Maybe I can explain to the jury and to everybody how this stock

transfer business works. If someone in Californa owned 100 shares of First American Bank of Virginia stock, and they wanted to sell it, they would go to a broker in California. That stock certificate would have to make its way to First American Bank of Virginia, where we would go ahead and record the sale of the stock on the stockholder's records, and then we would create a new ledger that had the stockholder's name, address, [481] Social Security number, and the number of shares that were purchased. So we are responsible for all the record keeping that is involved with the shares.

Q So that the bank's records show the names of the shareholders and their addresses for mailing dividends and things of that sort?

A Yes, sir

Q Now, have you at my request gone back into your records and made a determination of how many transfers of shares of bank stock took place in the year 1984?

A Yes, sir, I have.

Q How many such transactions were there?

A Okay. There were 235 transactions for 101,480 shares.

Q How many of those transactions involved brokers?

A There were 134 that involved brokers. There were five that involved a holding company, and there were 173 shares that involved other type of transaction between individuals.

Q Of the 101,000 shares transferred in 1984, how many were transferred either to or from the holding company?

A Five.

Q In 1985, how many shares were transferred of bank stock?

A There were 185—I'm sorry—did you say shares [482] or transactions?

Q Transactions.

A There were 185 transactions for a total of 76,090 shares.

Q Of those transactions in that year, how many involved brokers?

A There were 120 transactions that involved brokers.

Q How many involved the holding company?

A One. For 1985, there was one transaction.

Q And how many shares—did you already give that number of shares, please, in 1985?

A Pardon?

Q The number of shares transferred in 1985?

A Okay. In 1985, there were 76,090 shares.

Q In 1986, how many transactions were there in bank stock?

A There were 250 shares—I mean 250 transactions. I'm sorry.

Q How many of those involved brokers?

A There were 147 transactions that involved brokers.

Q How many involved the holding company?

A Two

Q How many shares were transferred in 1986?

A There were 103,304.

Q How many of those shares were holding company [483] transfers?

A Two

Q That's the number of transactions. How many shares were involved in the two transactions?

A I'm sorry. I lost your—you want to repeat the question?

Q Let's go back.

A What year?

Q I am in the year 1986.

A Okay.

Q I am asking of the shares, the 103,304 shares transferred on the books that year, how many such shares either went into or came out of the holding company?

A Okay, there were 1,798.

Q In 1987, I believe there was a merger that put all the shares in the hands of the holding company sometime during the course of the year, correct?

A That's correct.

Q Now, notwithstanding that, how many transfers not counting that, occurred in 1987?

A There were 94.

Q How many of those involved brokers?

A There were 65 of the 94 involved brokers.

Q How many involved the holding company?

A One.

[484] Q That's not the merger, that is one other transaction?

A That's correct.

Q How many shares changed hands in 1987?

A 62,234.

Q And of those 62,234 shares that changed hands other than in the merger, how many went into or out of the holding company?

A 700.

Q Did you total the activity from 1984 to 1987 first by number of transactions?

A Yes, I did. There were 764 transactions.

Q How many shares of stock were transferred in those 764 transactions?

A 343,108.

Q How many of the transactions involved brokers?

A 221,918.

Q That must be the number of shares, isn't it?

A That's the number of shares, yes, that involved brokers.

Q Yes. Right. How many transactions transferred those 221,918 shares?

A 466.

Q How many transactions in the entire three-plus year period involved the holding company?

[485] A Okay. This was 1984 to 1987. Is that correct?

Q Yes.

A Okay, there were nine transactions.

Q And of the 343,108 shares of the bank's stock transferred in the period, how many shares were either into or out of the holding company?

A 20,499.

Q Now, I also asked you, Mrs. Bragg, since '87 was shortened by the merger transaction, if you would do the figures for the three full years, 1984 through 1986. Did you do that?

A That's correct. Yes, I did.

Q In those three full years how many transactions took place?

A There were 670 transactions for 280,874 shares.

Q How many of those transactions involved brokers?

A There were 401 transactions.

Q And how many involved the holding company?

A Eight.

Q And of the 280,874 shares transferred in the three-year period, how many were transfers into or out of the holding company?

A 19,899.

Q Did you strike an average for the three-year period, 1984-1986 for the number of shares transferred?

[486] A Yes, sir, I did. That total was 93,625 shares.

Q And what was the average number of transactions in those three years?

A 223.

Q Now if we add in the partial year of '87, would you give me the average number of shares and number of transactions?

A Okay. If we add in '87, there was 85,777 shares and an average number of transactions was 191.

Q Now, were you also requested by me to total the number of transactions in excess of 1,000 shares in that same time frame?

A Yes, I was.

Q And would you give us just a year by year giving the year and the number, the year and then the number of transactions involving over 1,000 shares each year?

A Okay. In 1984 there were 24 transactions. In 1985, there were 12. In 1986, there were 18. In 1987, there were 14 transactions over 1,000 shares.

Q Mrs. Bragg, have you summarized the material that you have just given me on a memorandum that you are looking at?

A Yes, I have.

MR. STUMP: Your Honor, this was not prefiled but for everyone's convenience I'll be glad to offer it as our [487] exhibit.

THE COURT: Any objection?

MR. KEENEY: We would like to see it first, Your Honor. I don't think we are going to have any objection, but we would like to see it.

THE COURT: All right.

(Counsel examining document)

MR. STUMP: While we are looking at that I can proceed if Your Honor wishes.

BY MR. STUMP:

Q Were you involved—Mrs. Bragg, do these transactions that you have just testified to involve all of the transactions in bank stock in the three-plus year period?

A No, they don't. We excluded the right offering transactions. We excluded the Roundteral Merger (phonetic) transactions and we also had an employee stock plan where we gave employees an opportunity to buy stock through payroll deductions. We excluded those transactions also.

Q These are transfers from one owner to another, purchases of sale, that sort of thing?

A Yes, sir.

Q If you had included the other transactions I take it the number of transactions and the number of shares would have gone up?

A Yes, sir.

[488] Q With respect to the rights offering, and I would like to call your attention to the rights offering in 1986, did you have some involvement in that rights offering?

A Yes, I did. As transfer agent and registrar, we were responsible for all the record keeping of the rights offering.

Q Would you tell the jury in brief form how that responsibility was discharged, that is, how the returns came in from the rights offering and how you kept track of it and got the right number of shares out to the right number of people.

A Okay, basically what happened first when we found out about the parameters of the rights offering, which was for every 28 shares a stockholder owned, they could buy one more share for $30 a share, or they had the right to to buy one more share. And that's where the word rights offering comes from. When we found out the parameters of the rights offering, we ordered a trial balance from the computer that stated as of the record date which was January 31, 1986, the number of shares each stockholder owned; and that was the basis of starting the record keeping process for the rights offering. We then ordered labels that had the stockholder's name and address on it, and number of shares. We affixed that to a subscription form and a circular that explained the terms of the rights offering and mailed that to the [489] shareholders. So every shareholder was given the opportunity to buy stock in the rights offering if they owned over 28 shares.

What happened after that was we received back a form, the same form that we had mailed out, we received back a form with a check that indicated the number of shares the shareholder wanted to purchase. In addition to the basic subscription of one share per each 28 shares they owned, they also had an opportunity to buy shares for the same, under and over subscription for the same number of shares they decided to buy under the basic subscription. Se wo received all the checks and the forms

back; and we compiled a work sheet that basically contained the stockholder's name, the number of shares that they wanted to purchase under the basic subscription, the number of shares for the over subscription and that was it.

Q Did you then determine how many shares each shareholder would be entitled to receive in the rights offering?

A Yes, we did.

Q And did you at my request make a list of the number of shares that the minority shareholders were eligible to purchase in the rights offering and compare it with the number that they in fact did purchase?

A Yes.

Q Did you make a graph of the results of that study?

[490] A Yes, we did.

MR. STUMP: I would like this to be shown to her. If she identifies it, we have a somewhat larger one which may be easier to see. This is our prefiled exhibit. This is our prefiled Exhibit 10-A.

BY MR. STUMP:

Q Is that the chart that you prepared?

A Yes, sir.

Q Have you also had it enlarged under your directions?

A Yes.

MR. STUMP: Set up the easel, please.

BY MR. STUMP:

Q Now, Mrs. Bragg, I will point first to the blue line, the blue bar on the graph, and ask you to tell the jury what the blue bar represents.

A Well, that represented the number of shares that were available to the minority shareholders to purchase, and it was 25,771 shares.

Q And then to the red bar, and ask you to tell the jury what the red bar represents.

A Those are actually the number of shares that were purchased, and that amounted to 15,024.

* * * *

[492] Q Now, Mrs. Bragg, let me point first to the gray bar—let me point first to the blue bar on the far left of the graph. What does that represent?

A Okay, that represents the number of minority of shareholders who could purchase—the number of minority stockholders of First American Bank of Virginia. And that was 2,091.

Q What does the gray bar represent?

A That represents the number of shareholders who owned less than 28 shares, so they were ineligible under the rights offering.

Q What does the red bar represent?

[493] A The red bar represents the number of shareholders who subscribed to the stock under the offering.

Q What does the blue bar represent?

A The blue bar represents the number that were eligible but did not subscribe to the stock.

Q So that the total number of nonsubscribers is the total of the gray bar and the blue bar; is that correct?

A Right.

Q But the gray bar people in order to buy would have had to join up with somebody else?

A Correct. They could have purchased rights from another stockholder.

Q Mrs. Bragg, is it also your responsibility to keep track of the prices at which bank stock is traded?

A Yes, sir.

Q How do you do that?

A Well, what we did was we referred to the banks and insurance section of the Washington Post, and on a weekly basis, recorded the prices of the stock in front of our stock ledger.

Q And you have been doing that for how many years?
A In the early 70's, for sure, 1979.
Q At my request, did you take those weekly numbers and get an average for each month so that you could give us a graph of the monthly average prices for the shares?
[494] A Yes, I did.
Q Did you make a graph of that?
A Yes, sir.
MR. STUMP: Could I have this handed to the witness?

(Marshal handing exhibit to witness)

BY MR. STUMP:

Q Mrs. Bragg, I judge from the appearance of the graph that the prices of the stock were taken beginning in January 1984 through January of 1987. Is that what those black lines are?
A That' correct.
Q And does each vertical bar represent the average of the Washington Post price quotations from the particular months?
A Yes.
Q And what does the blue bar represent?
A Well, the blue bar represents the $30 a share that was offered, that the stockholder then had an opportunity to buy stock at under the rights offering.
Q In other words—
MR. STUMP: And this is prefiled 10-B, if Your Honor please. I would like to offer it into evidence as 10-B.
THE COURT: Any objection?

* * * *

[495] Q Then the blue bar on Exhibit 11 relates to the price at which the rights offering that your two graphs Exhibit 10, were offered at, is that true?
A That's correct.

Q What is the red bar on the graph?
A That represents the 1987 merger price of $42 a share.

* * * *

TESTIMONY OF MICHAEL CONNOR

DIRECT EXAMINATION

[498] Q Mr. Connor, did there come a time in 1986 when you and your firm were retained by First American Bankshares, Inc. with respect to a financial transaction.
A Yes.
Q What were you asked to do at that time?
A We were asked to advise the company about a possible purchase of the minority interest of the First American Bank of Virginia and to arrive at a price that would be fair.
Q And approximately when were you asked to do that, handle that assignment?
A Late in the year, November or December.
Q Did you in fact render an opinion to First American Bankshares, Inc?
A Yes, we did.
Q Did you submit a written statement reflecting that [499] opinion?
A Yes, we did.
Q Prior to that time, were you engaged by a formal engagement letter?
A Yes, we were.
MR. CAWLEY: Your Honor, those two documents are Exhibits 3 and 5 in our submittal. I don't think there is any questions. I think they are in evidence some way or the other.
THE COURT: Yes. They have been discusesd at length.
MR. CAWLEY: That's right.

BY MR. CAWLEY:

Q Mr. Connor, would you tell the jury what your opinion was with respect to a fair price for the acquisition of the minority interest in First American Bankshares?

A It was the opinion of our firm that a price of $42 was a fair price for the purchase of the minority interest.

Q Now, would you tell the jury how you came to that conclusion?

A There are a number of factors that we looked at in this particular case. First, we looked at the condition of the company. Was the bank healthy? Was it competitive in its market, the Virginia market? Were its financial ratios acceptable within the framework of normal performance of a [500] Virginia bank? We concluded, after examining information about the bank that in fact it was a healthy bank. If we had concluded that it were not a healthy bank, we might have concluded that it was not wise to go forward.

We looked at the market for the stock. We wanted to confirm that the market was a valid market and from which a price could be derived to make an offer for the minority shares. We did in fact conclude that the market was a valid market. That is to say, that the price level of the stock prior to the offering being made approximately $32 to $33 a share, did represent a price that took into account all available information that the public would need to establish a price level.

We took into account the fact that the parent company did not have to make an offer, that it had been in the past and was continuing to have purchase transactions in the open market of the stock. We did in fact look at the transactions and the price levels by the company in the year or two prior to the transaction. The company had increased the price that it had been offering for the stock by approximately 30 percent during the

two years prior to the offer for the minority shareholders as a whole.

We looked at the fact that the company wanted to do a deal, an offer, make an offer, that was unassailable from a reasonable standpoint. It was clearly a part of our charge [501] from the company to arrive at a price that would be fair.

Certainly, we were retained by the company, by the parent, specifically for them. But there was no question that they wanted us to arrive at a price that was fair and would be deemed to be fair by the minority shareholders. That was central to our charge.

It was very significant to us in examining the market value of the stock that a rights offering had been done.

Q Is that the same rights offering that has just been discussed?

A Yes, it is.

Q Why was that significant?

A It was significant in determining whether or not the general price level of the company at that time was valid. In fact, the offering had been over-subscribed, if there had been a substantial interest in buying stock, it would have been reflected in a complete purchase and requests for more. The fact that it was not successfully subscribed was an indication that in fact the price levels then in the market reasonably reflected the combined view of the market on that price, that it was a fair market at that time, taking into account all information about the company that could be known.

Q Did the fact that the offering was at the price of [502] $30 appear significant to you, that is to say that the rights offering was premised on paying only $30 a share?

A Typically a rights offering is offered at prices below the then current transaction level, and the company had been paying prices slightly above that in previous transactions.

Q Are you saying that it's significant even when the price went below what the then offering price was, there still wasn't a tremendous interest in it?

A There was substantial interest, as there usually is in rights offerings, but there was no stampede. If there had been a stampede, that would have implied some belief by participants in the market that in fact the price was too low, that it was a steal.

We examined transactions, as I said, by the company in the market, and frankly, we were surprised that they bought as many shares as they did. It would not be surprising in a situation involving an 85 percent holder to see virtually no transactions at all.

Of central importance in the entire process was the fact that the proposed transaction was not a controlled transaction.

Q What does that mean?

A It is not a transaction in which control is being acquired. The question of control had already been [503] established.

Q Excuse me. What do you mean by control?

A The parent company controlled the subsidiary bank. The 85-percent ownership interest gave it sufficient ownership of shares to control any strategic decision-making in the bank. There was no possibility in other words that a controlled transaction involving a premium to the current market value could be done elsewhere.

Q Are you saying that stocks or bank stocks or any corporate stocks that do not have an 85-percent shareholder sell at a different price or sell at a price because of the control factor that is different?

A We examined First American Bank of Virginia stock relative to a peer group. The peer group consisted of banks in Virginia and in Maryland and I believe also covering the District of Columbia market. This is a very homogeneous market, and most of the bank stock in that market trade roughly comparable to each other. They represent in the aggregate a good reflection

of how bank stocks trade. We examined that upper group over a period of time prior to the offer being made to the minority shareholders. At all times during that period, the stock of First American traded at a discount to the average of the peer group. We defined the peer group in terms of a price-earnings ratio. The price of the stock divided by the earnings per share is the price [504] earnings ratio, and the ratio of market value to book value. These are common indicators used by any investor, certainly any investor of ours, in looking at the decision to buy or sell bank stock. At all times, First American stock traded at a discount of approximately 40 percent to the average of the peer group.

Q Why would the other banks sell for more?

A Rather, First American sold for less, because the possibility of a control transaction did not exist or was not deemed or perceived to exit in the marketplace.

Q And did it for those other banks with which you compared First American's stock?

A The Virginia and Maryland market are viewed as a very attractive market, because larger banks, specifically from Pennsylvania, North Carolina and other markets would—it was commonly known want to be in that market.

Q What impact does that have on the stock price of those banks?

A Those stocks trade with an amount of speculation in them that includes the possibility, the hope that a controlled transaction, a sale of the company transferring control from the existing base to a new presumably another bank, that that type of transaction would take place. That possibility in this instance did not apply, and that accounted in my view in our firm's view for overwhelming [505] percentage of the lower price for First American Bank.

Q Your firm is an investment banker?

A Yes, we are.

Q What does that mean?

A Our firm is a firm that trades bank stocks. We act as an adviser in mergers in banks exclusively in banks and thrifts and perform investment banking services and advising clients in buying and selling not only bank stocks but also buying and selling banks.

Q In other words, you are saying with respect to your comparison of the other banks, that if I were to want to buy a share of stock in those banks, I would have to pay more because there is that chance that somebody can come in and buy control of that bank?

A No question.

Q That's correct?

A That's absolutely correct.

Q But that possibility isn't present with the First American Bankshares of Virginia stock?

A We examined the possibility of a controlled sale, the possibilities of an alternative bid being made after the announcement of the offer at $42 should it go ahead, should the board of the subsidiary bank accept the offer and it be announced.

We concluded that it was not reasonable to assume [506] that another offer would be forthcoming.

Q Because someone would have to buy, not only convince the investor to sell, but then have to buy over 85-percent if they bought the entire amount?

A That is correct.

Q Did you determine however whether the market price that was being paid for First American over the past few years—and I take it that's what is represented on that chart?

A My understanding of that is that that represents quotes in the newspaper. It doesn't necessarily represent the actual prices paid in any transaction.

Q Would that give one a rough idea of the history of the value of the stock for the past three years?

A It's consistent with our understanding of the transactions that took place certainly by the company, the

parent company in acquiring shares at various times during that period, yes.

Q Are you saying that—does your opinion—

MR. KEENEY: Objection to the leading nature of the witness—

MR. CAWLEY: I accept that objection.

BY MR. CAWLEY:

Q Would you state what relationship if any your view of the market played in our calculation that $42 was fair?

A In order to assume that the price was fair, we [507] wanted to make sure, we wanted to be comfortable that the trading range of the stock and the period leading up to it was in fact a valid trading range, and the peer group analysis was important. It was important because over a period of time, transactions in the stock ought to reflect a constant or relatively constant discount from the average of the peer group.

We are also particularly interested in the months leading up to our retention and the actual offer being made a few months later to make sure that the stock had continued to perform in that period. Presumably, during that period of time, there was contemplation of an offer. We wanted to make sure that nothing untoward, nothing negative was happening to the stock.

In fact, relative to the peer group, the stock actually rose. The transaction prices actually rose during that period, because in the last six months of 1986, in fact, there was an average price decline in the peer group of almost 20 percent, whereas the transaction prices that we were familiar with on First American Bank remained constant.

Q What did you conclude after you compared the trend in prices with respect to First American Bank of Virginia with the peer group?

A We concluded that the stock had exhibited a relative price level to the peer group that was reasonable

and [508] constant, that the rights offering, the existence of the rights offering at that price also buttressed the notion that the price was perceived in the market, that it was reasonable.

We also saw no indication that the stock had been suppressed, that the price had been actively suppressed. The fact is that prices had been trending upward by about 30 percent during the two-year period, that no action had been taken by the parent company that would depress the price of the stock actively. In fact, it had been going the other direction. We were comfortable that there was nothing artificial in the price of the stock during that period and at the time of the offer that rendered the market invalid.

Q So did you conclude therefore that the market was valid with respect to this stock?

A Yes, we did.

Q Once you have done that, what is the significance of concluding that the market is valid for this stock?

A Because the market is the basis of determining the price that would be offered to the minority shareholders.

Q Why is the market price the basis for your calculation as to what is fair?

A It's the reality that we deal with.

Q What does that mean?

A It means that in a—this is not a controlled transaction. That is a fact. Premiums to the existing [509] market are not offered in a noncontrol transaction. There is no reason to. The company had no obligation to buy the shares. The company had the right to buy the shares but not the obligation. And in fact there was no compelling reason for the company to go ahead with a premium offer. Neither legal nor regulatory nor in our view financial reason to offer a premium to the existing market in order to buy shares.

The only purpose in making a premium offer is to show convincing evidence of the intent to be fair, because

the shareholders were going to be asked to tender the shares and the vote was a foregone conclusion.

Q Could a price below $42 be fair?

A Yes.

Q In this situation?

A In my view, yes?

Q How low could it be and still be fair?

A Technically any price above the market would be fair in our view. Clearly there is a human element involved in a transaction of this nature. The company owned 85 percent of the stock and has 85 percent of the vote. If it makes an offer that the board approves, all shareholders will be obligated to go along. Consequently, good faith requires, and the company made it a part of its charge, to come up with a price that will show those minority shareholders that we are being fair, that we are offering them a substantial premium [510] that isn't technically required but is being offered out of good faith.

Q And is the, so the price $42 is not the premium fair price?

A No, it's not.

Q Is it the maximum fair price in your judgment?

A Yes, it is.

Q Would you explain that? Would you explain that?

A There was no compelling reason for the company to do the transaction. There was good reason for the company to offer a premium to the minority shareholders, because they were being asked, required, upon board approval to tender their shares.

Q And so $42 therefore is the maximum price that you would recommend to the holding company to pay?

A At a price, it makes no sense for the company to pay a premium when in fact it could be buying the stock in the open market. All it's giving up by not buying the company, by not buying the remainder of the company, all it's giving up is the time value or the time that it takes to accumulate it.

Q Now, you have heard—withdraw that. Are there other methods that you considered and rejected or knew were out there in terms of valuing bank stock that you did not use?

A There is no such thing as a formula if that is [511] what you are asking.

Q Yes.

A There is no such thing as a formula that comes up with a value. Clearly in any transaction of this nature, we are ultimately dealing with willing buyers and willing sellers. The company has been a willing buyer in the market (the parent company has been a willing buyer in the market for a long period of time and has over time succeeded in acquiring some shares. For the company to pay a premium that it really doesn't have to pay as long as it's willing to take the time to acquire the shares is only justified if it wishes simply to close the deal now, to close the transaction now. And the company in fact did want to do it right away.

Q Is it your view that the price of $42 a share was more than fair?

A I viewed it as generous.

Q Now, what about other methods that we have heard about from Mr. Krabill such as dividend discount models, what is your reaction to that approach?

A I agree with Mr. Krabill's comment if I am stating it correctly that for every investor in a stock whether it's a bank or any other stock, there is a different approach to perceiving value. The dividend discount model is highly sensitive and highly personal. It depends upon ultimately the required return on an investment of the person making [512] the investment. Consequently, a dividend discount model can be utilized to support virtually any price you want to based upon your own demands for return for the investment you are making. It is a formula—I have been involved in 70-80 mergers, and a dividend discount model has never been a method that has been used by any of those mergers. It is particularly inappropriate for a bank transaction.

Q Why is that?

A Because banks have capital demands that are not reflected in a dividend discount model. They do not reflect the full—dividend discount model does not reflect the full price in acquiring a bank.

Q What about Mr. Krabill's use of what he called I believe peer group comparison, that is comparisons with other banks in the Virginia area?

A Well, we used the peer group comparison, too. The purpose of the peer group comparison was to validate the ongoing price of First American Bank relative to the peer group. There was no surprise that the stock traded at levels below that peer group because the control transaction element did not exist in this particular instance.

Q Do you have a judgment as to the fact that if other bank stocks can sell for more, it's because they are more attractive?

A It's because the person who owns that stock has the [513] possibility of a controlled sale to another company.

Q That's not true or is true with First Virginia?

THE COURT: I think he has testified to that.

MR. CAWLEY: I think that's right.

BY MR. CAWLEY:

Q Mr. Krabill came up with a judgment in his view of $60 per share for this stock. What is your reaction to that judgment?

A It's wrong.

Q Why do you think it's wrong?

A To reduce it to its simplest terms, a $60 per share investment would require a $45 million investment by the parent company. Based upon an internal memo that Mr. Scoffone testified about, at the $60 or $61 level, I guess it was the $60 level, the company would show a profit of $300,000. If I were to ask any client of ours to invest $45 million for only a $300,000 return, I would be invited out the door.

To make that more apparent perhaps because of the size of those numbers, that would be the equivalent of taking $4,500 on January 1st and 12 months later having only a $30 return to show for it. That is less than one percent. That is a bad investment. Whether you borrow the money or whether you put equity into the bank at that level, there is absolutely no justification for that type of return.

Q With respect to that memorandum, does it include [514] all the costs that could be incurred based on the assumptions in that memorandum?

A No, it doesn't include the capital costs, particularly on the cash transaction. Banks, unlike industrial companies, are required to have capital. When a bank makes an acquisition, it must have capital to support it. The cash purchase of the minority shares not only eliminates the capital that had been provided by the minority shares, it also creates goodwill. Regulators deduct goodwill from capital, so there is a double negative effect. All that amount must be replaced. Additional moneys would have to be found, and that cost has not been reflected in, certainly in the memo that Mr. Scoffone presented.

Q So it's not even accurate, even though you said it's a bad investment, it's not even accurate that you necessarily would make $300,000 with those assumptions?

A That's true. That is not a theoretical exercise. It's real and every bank in this country has to deal with it.

Q Why do banks have capital requirements and other corporations not?

A Banks are regulated.

Q Essentially what does capital mean in your terms?

A Well, in my terms it means real money, not borrowed money, to support growth. It has become an extremely important element of bank regulation and is one of the [515] reasons bank stocks trade at lower prices than industrial stocks.

Q Leaving aside what you have just discussed with respect to whether it would make sense for the company

as a business sense to invest that, is the stock worth $60, leaving aside the business aspect of it from the corporation itself?

A I would be embarrassed to recommend to the company that they offer a price of that magnitude in this transaction.

Q Why do you say that?

A Because it's not necessary.

Q Is the stock work $60?

A No, it's not worth $60. It's worth $42.

Q Now, who retained you from the holding company?

A Which person?

Q Yes.

A Mr. Beddow.

Q And—

A Excuse me. I'm not sure I know exactly what you mean by that.

Q Which person contacted you?

A Mr. Beddow, yes.

Q And was he the person with whom you had most of the discussions?

A Yes, he was.

Q Did you deal with other persons as well in the [516] company?

A Primarily with Mr. Beddow. We also met with Mr. Altman, Mr. Clifford and at various times Mr. Scoffone and Mr. Stevens.

Q Had you had any experience with the company before that?

A Yes, we had.

Q Did you review any information that you had requested the company to supply you in terms of your analysis?

A Would you ask the question again, please?

Q Yes. Did you also review data with respect to the bank?

A Of course.

Q Where, how did that take place?

A Information was provided to us, sent to us in our

offices and we also had meetings in Washington at the parent company's office.

Q Now, there has been a question asked as to the difference between a company coming up with a decision as to a price and then having an investment banker answer the question as to whether that's fair, or a company asking an investment banker to come up with a price. Which of those two situations were you asked about?

MR. KEENEY: Objection, Your Honor. We have already been through this earlier today.

[517] MR. CAWLEY: I don't think exactly, Your Honor. I think there is a difference.

THE COURT: Maybe not exactly, but we have been through it.

MR. CAWLEY: Very well.

BY MR. CAWLEY:

Q When did you come to your conclusion in respect to the fairness of $42 a share?

A It would have been prior to the meeting with Mr. Clifford and Mr. Altman because we presented our findings at that meeting.

Q Would you briefly describe that meeting?

A It was unremarkable. It was nothing in the meeting stands out in terms of controversy and contention. We went through the approach that we took, the variables that we examined, our conclusions as to the validity of the market for the stock of the company as a base from which to make a premium offer, the reasons to make a premium offer, and a reasonable premium that reasonable recipients ought to accept in our view. That presentation was accepted and based upon that, the company went ahead and made the offer.

Q Did you subsequently, were you subsequently asked to make a presentation to the board of the Virginia Bank?

A Yes, we were.

Q Would you describe how that came about, please?

[518] A An associate and I went to a meeting of the executive committee of First American Bank of Virginia

in their offices and made a presentation to them that was comparable to the one we made to Clifford and Altman and Beddow, of course. Again, we reviewed the reasons, the conclusions we reached, the reasons we reached those conclusions, and went through the process in effect that we used to arrive at the conclusion that $42 was a fair price. That process, that meeting lasted not more than two hours and again nothing remarkable occurred. Our sensitivity at that meeting was whether or not we noticed any attitude or any hostility that would have indicated that the deal wasn't, the offer, wasn't acceptable. We saw none of that.

Q In the engagement letter that is, I think, already in evidence, your fee is discussed and it was a two-tiered fee, $25,000 at the inception of the effort and $75,000 at the conclusion of the transaction. Is that type of fee arrangement typical or nontypical in your profession?

A It's typical in our profession. It's the only way our firm or our department will work.

Q What effect if any did the arrangement have on your deliberations as to your assignment to come up with a fair price for the minority?

A None.

Q Also in that engagement letter there is some language [519] that says without permission this opinion cannot be used by others. Did that prevent you from going over and discussing this matter with the Virginia board?

A Of course not.

Q Were you waiving that understanding?

A Pardon me?

Q Were you waiving that understanding? In other words, did you obviously go over of your own free will to discuss this with the board?

A Of course. Virtually every transaction we have been involved in we have had discussions with the other party to the transaction whether it was a merger or in this instance the directors of the subsidiary bank.

Q How long would you say the meeting took with the Virginia directors?

A Not more than two hours. Probably less.

Q A few minutes ago when you were discussing the importance of the market, Mr. Krabill testified that he did not like the market price because he called it a thin market. Did you consider that argument or did you consider those facts with respect to the activity in the market in making your deliberations?

A Certainly. The definition of a thin market is kind of like a definition of value. It's in the eye of the beholder. Clearly relative to the other major Virginia banks, [520] the market was thin in the sense there were many days in which the stock didn't trade and the absolute volume was not very high, so it was a thin market. When the stock has a thin market, the price will be affected to some extent simply because if you own stock and you want to sell it you may or may not have a willing buyer at any particular point in time.

The really important question is whether it's a valid market. We don't contest the notion that the stock did not trade a lot on every single day. That is not an issue to us. That's one of the known elements that goes into establishing a market. The fact is there are also stocks that trade at prices above a relevant peer group that would also be characterized as thin.

Those are circumstances that are on a case-by-case basis. The important issue is whether it's a valid market. This had a valid market.

Q Did the figures you heard support your view, though, that there was activity in the market, figures you have heard just recently with respect to charts that have been put on?

A Frankly, it was a surprisingly high amount of activity for the small number of shares outstanding. Yes, I was surprised that it was as much as it was.

Q Does it impact on your decision it's a valid market?

[521] A Yes. It buttresses it. It supports it.

Q In your analysis of the fair price for this stock, did you take into account the fact that what the book value was?

A We noted it.

Q Did you consider whether or not there were adjustments to book that were significant and would have dramatically or materially changed the book value if they were adjusted to that value?

A Yes, we looked into that because sometimes there are adjustments to that book value that do not show up in financial statements. They may or may not have an impact on an outsider's perception of value. We routinely look at real estate values. We look at pension fund costs. We look at goodwill. We look at the devaluation of securities owned by the bank as to whether or not their market value, the value that could be realized if the bank were to sell the securities was the same as or more than or less than the value shown on the books. All of these types of items can have an impact positive or negative.

In this particular instance, there were a number of areas in which the value that was realizable, the market value was more than or less than the value on the books.

The net of it is, netting all those out, we did not see any difference in value or change in the book value if [522] you made all those adjustments that had any impact at all on our decision as to a fair price.

Q In other words, some of those adjustments would have been up and some down?

A Yes. Goodwill for example is a negative adjustment. Reserve levels for loan losses in this particular instance were below the peer group. The credit quality was comparable to the peer group. In other words, the health of the loan portfolio was comparable, but the reserve was lower. An adjustment there would require an expense to add to the reserve and therefore a deduction from book value.

The real estate values were clearly higher because of unrealized gains based upon market appraisals on proper-

ties owned by the bank. So all those elements go to—are netted out against each other to see what the net impact would be. In this particular instance, we saw nothing that indicated that the stated book value of approximately $33 didn't accurately reflect all those adjustments.

MR. CAWLEY: I have no further questions. Thank you.

CROSS EXAMINATION

BY MR. STUMP:

Q You have testified as I understood you to Mr. Cawley that the $42 number was the highest you would recommend to the holding company—

[523] THE COURT: Mr. Stump, it really isn't fair for you to double team on this one issue. You are both in the same nest on this.

MR. STUMP: Your Honor, if I ask more than five questions, I'll surprise myself. I really only want to make one point.

THE COURT: All right.

BY MR. STUMP:

Q You testified that anything higher than $42 you would have not been willing to opine on to a holding company. Did you have an opinion or do you have an opinion as to whether $42 per share was fair to shareholders of First American Bank of Virginia and if so, what is your opinion?

A As I said earlier, that was central to our charge from the parent company. We want a deal. We want a transaction that is fair. We want it to be acceptable. We want a friendly deal so by definition even though we were working for the holding company, our charge was to come up with a price that the board of directors could reasonably view as fair, and at the $42 level, we were above the level that we would consider fair. It was not necessary to get to $42 from the standpoint of the company or from the standpoint of the shareholders if we had

been advising the shareholders to accept that level. We chose $42 because in our view if you are going to make an offer that is fair, make the maximum [524] number offer which you are prepared to make.

THE COURT: We are hearing exactly the same testimony we have already heard.

MR. STUMP: Yes, sir. Thank you.

BY MR. KEENEY:

Q Good afternoon again, Mr. Connor.

A Hi.

Q If I understand your conclusion about $42 a share does not involve giving a shareholder a pro rata share of the bank's value in the same proportion as that one share would be to the number of shares outstanding. Is that right?

A I don't know what you mean.

Q Let me ask it this way: assume that there is a fixed amount of value in the bank, assume that a shareholder owns one share in that bank. He has his proportion of the pie represented by that one share divided by all the other share outstanding. Do you understand the concept, then I will ask you the question.

A Yes.

Q The question is this: as I understand your conclusion, you don't draw your conclusion by giving that one shareholder with his one share a pro rata share of the ongoing business, do you?

A I still don't think I know where you are coming from. I can surmise that you are trying to suggest that [525] there is a value of the company that isn't being reflected in this price?

Q No. I am trying to just get solely at your calculation. In other words, assume that the company has a value and for this purpose and this question, assume any value.

A You are implying a control sale. That is not part of this process.

Q I am trying really not to imply it.

A I think Mr. Krabill agreed to that yesterday.

Q I am not talking about control sale. Let me rephrase my question. I am assuming for purposes of simplicity, assume there are five million shares outstanding. You and I know it's a little much but assume five million. Assume a shareholder has one share. Under your analysis, are you giving that minority shareholder one five-millionth of the business?

A You are asking what the value of the company and is it $42 a share? That is what you are asking me.

Q No, I am really not asking that.

A I don't understand it.

THE COURT: Why don't you answer the question yes or no or say you can't.

THE WITNESS: I can't answer your question.

[526] BY MR. KEENEY:

Q Let me turn to something else. In this merger there were two groups of shareholders who were treated differently, right?

A Who were the two groups of shareholders?

Q Let me explain. In this merger there was one group of shareholders that held 85 percent and after the merger they received stock, right

A Correct.

Q There is a second group of shareholders, 15 percent minority. After the merger, they received cash, right?

A Right.

Q So the two considerations are not identical. One got stock and one got cash, right?

A That's correct.

Q As part of your analysis, did you study whether those two considerations are equal?

A No.

Q It wasn't part of your charge?

A No.

Q And it isn't part of your opinion?

A Part of my—?

Q Part of your opinion

A No, it's not.

Q So you are not expressing any opinion to this jury [527] today as to whether equal consideration passed to the two groups?

A Again, by definition, the deal was fair to the parent company, that we opined, we were hired to do a deal, to do a transaction that would be in their interest, but they also told us, we want a transaction that is fair to the minority.

Q But your charge was not to see if it was equal to the minority, merely fair?

A That's correct.

Q I would like to talk to you a little bit about the dividend discount model. Would you agree with me that under the dividend discount model, every single share of every single shareholder is treated equally, i.e., it reflects his individual share's right to the future dividend that accrues to that share?

A Theoretically, that is correct.

Q And isn't it also true that under your model, you don't treat each individual share the same?

A You are assuming something about the value of the whole company that isn't reflected in the $42 price, I believe is what you are saying, but I am not sure I know.

Q No, that really wasn't my question. I didn't mean to assume anything. We have already discussed the fact that the dividend discount model treats every share equally. My [528] question to you, does your model treat every share equally?

A This is not a model. It is not a formula, and the transaction is not a mystery. The company had the right to acquire shares in the market or minority shares in a merger transaction.

Q You testified about the peer group that you used in your testimony. You recall that testimony?

A Yes.

Q And in fact when you looked at the Virginia peer group, the six banks in your peer group were exactly the six banks that Mr. Krabill chose in his Virginia peer group; isn't that right?

A Yes. We also included Maryland banks.

Q That's correct, but in your analysis in fact what you did is you had two columns, one that was Virginia banks and one that was regional banks, which would include Maryland and D. C. right?

A Yes.

Q So that when you did the analysis of Virginia banks only, you were doing essentially what Mr. Krabill did with his peer-comparable model, right?

A Yes.

Q You recall the discussion today about a thin market for the shares of First American Bank of Virginia?

A Yes, sir.

[529] Q Do you also recall your own deposition referring to it as a shallow market?

A Fine. That issue was never in doubt.

Q When you studied First American Bank of Virginia you reached a conclusion, didn't you, that it had good earnings vis a vis its peers in the Northern Virginia market?

A We concluded that the company was in good financial condition. From a ratio standpoint the numbers were slightly below but not sufficiently to make us think that it was not a healthy competitive company.

Q You further thought, didn't you, that they had a solid good geographic market in Northern Virginia?

A Certainly.

Q Did you have an opinion about future prospects?

A That they were solid, comparable to other quality banks in Virginia.

Q In your analysis did you uncover an unrealized gain on the real estate of First American Bank of Virginia?

A We were informed in asking about real estate that there were unrealized gains in the real estate owned by the bank for its business.

Q You were told, weren't you, that on one property alone, the Arlington property, the unrealized gain on that single property was $10 to $11 million. Isn't that right?

A That's right.

[530] Q And on a per-share basis, that's over $2 a share, isn't it?

A Pre tax.

Q In addition to the Arlington property, there were other properties that had higher values than the book value, isn't that right?

A That's right.

Q Do you recall a figure as to how high those values were?

A I think numbers as high as $4 or $5, $6 may have been mentioned. I can't recall exactly.

Q That's $4 to $5 or $6 a share, right?

A Per share. That would be basic appraisal values of real estate used by the bank.

Q I was intrigued by your testimony about the dividend discount model in 70 to 80 previous deals that you were talking about. Had any of those 70 to 80 mergers that you were talking about in which the dividend discount model was not used, did any of them involve freeze-out mergers of minority shareholders in a bank situation?

A Yes.

Q How many?

A We have represented two groups in minority share buy-outs.

Q The dividend discount model was not used there, is [531] that right?

A No, it was not.

Q Who was doing the modeling? Was it you yourself?

A I and others in the department, yes.

Q So in fact all you are testifying is that you don't use the dividend discount model. Is that correct?

A I can also testify that I have never had another investment banker in a bank merger use a dividend discount model to either justify a higher or lower or any price at all.

Q What about in terms of justifying a price to be paid a minority shareholder who is being deprived of the future earnings of his investment and being forced out involuntarily?

A No.

Q Do you recall your testimony about a memorandum by a gentleman named Mr. Scoffone?

A I do.

Q Are you telling us today that you, Mr. Connor, are relying on the Scoffone memo for your conclusion that a $60 price is inappropriate? Are you telling us that today?

A Only in the sense that if the numbers were calculated correctly, and I know of at least one that would have to be recalculated, than an investment of $60 at an interest rate of 9.5 percent on a cash cost to the buyer, and after taking into account projected earnings, goodwill deductions and other aspects of such, that the company has a $300,000 [532] profit after the acquisition at $60 a share.

Q You are adopting that analysis subject to the exceptions that you just noted?

A I believe it's a correct—I believe they are correct calculations. I did not try to replicate them.

Q If they are incorrect, would your opinion change?

A No.

MR. KEENEY: We have no further questions.

MR. CAWLEY: Two questions, I believe.

REDIRECT EXAMINATION

BY MR. CAWLEY:

Q Mr. Keeney asked you about the financial prospects and current financial health of the company. Did you take that into account in coming up with your opinion?

A Yes, I did.

Q He also asked you about unrealized gains in real estate. Is that one of the areas that would be going up if you adjusted book, if that was a proper thing to do?

A Yes.

Q But are there other areas that would go down if you went into that process?

THE COURT: You brought that out on direct.

MR. CAWLEY: I believe that's right, Your Honor. Thank you, Mr. Connor.

THE COURT: You may step down, sir.

* * * * *

TESTIMONY OF GLENN W. SAUNDERS

DIRECT EXAMINATION

BY MR. STUMP:

[534] Q Would you please state your name, address and business relationship for the jury and what you do.

A My name is Glenn W. Saunders, Jr., 11312 South Shore Road in Reston. I am president of International Real Estate Associates, which is a small real estate development and investment company.

Q Are you a member of the board of First American Bank of Virginia?

A Yes, I am.

Q How long have you been a member of that board?

A I have been a member of the boards or the preceding banks for approximately 20 years.

Q Have you been in other ventures other than your directorship of the bank and your present work as the head of your own firm in the past 20 years?

A Yes, I have.

Q Just in summary fashion, would you tell the jury what those ventures have been?

A Well, I have worked for the City of Alexandria in the Department of Public Works, and then I was Town and City Manager of the City of Fairfax and then vice president of planning, engineering and construction for Reston in the construction of Reston, and eventually executive vice [535] president of Gulf Oil Real Estate Investment Company, which was an international real estate company.

Q Are you a director of organizations other than First American Bank of Virginia?

A Yes, I am.

Q Would you name those, please?

A I am a director in E-Z Communications, Inc., as well as of course my own company.

Q Mr. Saunders, did you consider yourself obliged as a director of First American Bank of Virginia to follow direction or control by the holding company that owned shares in that bank?

A No, I did not.

Q Do you now feel under any such obligation?

A No, I don't.

Q When did you learn that the holding company was making a proposal for a merger that would have the effect of giving it all the shares of the bank and the minority shareholders $42 a share per share for their shares?

A At our January '87 board meeting.

Q That was January 15, the testimony has indicated.

A That's correct.

Q You were present at the meeting?

A Yes.

Q Would you teil the jury, please, what you learned [536] at that time?

A We learned that the holding company desired to acquire all of the remaining stock, approximately 15 percent, and that they were proposing that we be paid, the shareholders be paid $42 per share.

Q What was your reaction to the proposal?

A As I indicted in my deposition, I was not surprised. I anticipated that this would eventually happen. We just did not know when.

Q What was your reaction to the price proposed?

A I really didn't drawn any conclusions at that time. It was in the ballpark of where I thought it should be, but I felt it needed more study and we needed more information before we could arrive at any conclusion.

Q Now, in making the study and attempting to arrive at a conclusion, what duties were you, or to whom did you feel you owed your duties?

A I was looking out primarily for the minority shareholder.

Q And what did you feel would be the right way to go about trying to decide in the interests of minority shareholders what to do about it?

A Well, we discussed within the board just how we should proceed and whether we should appoint a special committee to review the proposal. We finally concluded that [537] we had a standing executive committee that met weekly, and it would be appropriate just to let them take it under consideration. The executive committee and there may have been testimony to that earlier, was made up of some fixed members plus rotating members from the regular board.

We also recommended at that time that Mr. Broyhill be added to that group since he was the member of our board who had the greatest number of shares of stock.

Q Was that consideration of putting it on the executive committee adopted by the board on the 15th?

A Pardon? I missed that.

Q It wasn't a very good question. What did the board do on the 15th with the proposal?

A They referred it to the executive committee for their review and study and asked that they report back to the board at our February meeting.

Q Were you at that time a member of the executive committee?

A No, I was not.

Q When did you next have occasion to consider the matter?

A At the February meeting, February board meeting.

Q Would you tell the jury, please, what was brought to your attention at the February board meeting?

A Well, the executive committee reported back that [538] they had considered the matter, that they had met with Keefe, Bruyette & Woods, that they felt that $42 was a fair offer and were recommending that the full board accept that.

Q And what other discussion was there on the 12th of February as you recall?

A Well, there was discussion—I really don't remember whether it was in January or February but as to whether or not we should consider hiring another firm, investment banking firm to make a study for us. There was also discussions and questions of the executive committee as to exactly how they arrived at their recommendation. If for example it's been testified earlier, they had taken into consideration the market value of the real estate and so forth.

After listening to them, we concluded obviously that the $42 was a fair price.

Q Can you tell me, tell the jury, more about the discussion at the meeting, whether it was January 15th or February 12th. on the subject of getting a second opinion and including if you would your own views.

A Well, we discussed whether or not we should, and as I said earlier, concluded that we should not. In my opinion, and that is the only person I can speak for obviously, I felt that given the same set of information and the same facts regarding the situation, that any two appraisers would come up with approximately the same value.

[539] Q Did you arrive at a judgment on February 12th or at any time prior to that as to whether the proposed transaction was in the best interests of the corporation?

A Obviously, I considered it and thought about it between the January and February meetings. I really did not come to a firm conclusion until the February meeting when we heard the report of the executive committee.

Q Did you at the February meeting come to such a conclusion?

A Yes, I did.

Q What was your conclusion?

A I concluded that it was a fair offer and that we should accept it.

Q How did you vote on the proposal?

A I voted in favor of the proposal.

MR. STUMP: No further questions.

CROSS EXAMINATION

BY MR. MERNICK:

Q Mr. Saunders, your counsel urged to the jury in his opening statement that all the members of the board, yourself included I assume were aware of the history of the transaction of the Maryland subsidiary. Were you aware of that history?

A Vaguely. Not in detail.

Q You know, do you not, that the holding company offered $30 per share?

[540] A I do now. I am not sure I knew it at that time.

Q And its investment banker, Keefe, Bruyette, said $30 a share is fair, right?

A I did not know that at that time.

Q Did you know that the Maryland Bank Board hired its own investment banker?

A No, I did not at that time.

Q You know it now?

A I know it now.

Q And that its investment banker said no, $30 a share isn't enough. $37 per share is what it ought to be.

A I did not know that.

Q But you know it now?

A I know it now.

Q Does it lead you to doubt your conclusion that every investment banker reaches the same conclusion if they are looking at the same institution?

A Not really. As I indicated, if they have the same set of facts and the same information, I think they will come to basically the same conclusion.

Q Do you think that Keefe, Bruyette and the Maryland board's investment adviser had different information that they were looking at in 1985?

A I really can't answer that. I don't know.

* * * *

TESTIMONY OF CHARLES HENRY SMITH, JR.

DIRECT EXAMINATION

* * * *

[541] Q Mr. Smith, you are a director of First American Bank of Virginia?

A Yes.

Q How long have you been a director of the bank?

A Well, the bank and its predecessors, 25 years.

Q What is your business at this time other than as a director of the bank, sir?

A I have a small investment company, Enfield Investment Company based here in Alexandria, which handles and puts together a mixed portfolio of investments.

Q Through the years, sir, have you been engaged in [542] other business activities in Northern Virginia?

A Yes, I have, through my company and outside of it as well.

Q Do you, sir, serve currently on other boards of directors?

A Yes, I do.

Q Would you tell the jury what boards those are?

A Greater Washington Investors, Alexandria Management—I think there are one or two others that are not too important.

Q Have you recently stepped down as a director of another financial institution?

A Yes, I have.

Q What was that relationship?

A I was chairman of the board of Fedstar Savings & Loan, Fedstar Savings Bank. I resigned from that on the 30th of June.

Q Did you learn of a proposal to buy out the minority shares of First American Bank of Virginia in a merger transaction?

A Yes, I heard of it.

Q When did you learn that, sir?

A At the board meeting on January 15th, 1987.

Q Would you tell the jury what your reaction to that proposal was when you heard it?

[543] A Well, my reaction to it was very optimistic. I was encouraged at the price. It was going to release capital where I could get a better return.

Q And what about your obligations with respect to the transaction. Did you also think of those on the 15th?

A Certainly. My interest was for the minority stockholders, of which I was one.

Q How many shares did you have at that time?

A I had 700.

Q Now, what transpired on January 15th with reference to this transaction?

A In the course of the meeting, and I don't remember at what point in the meeting, it was announced by, I believe, Mr. Drewer, or Beddow that the holding company had decided that they would like to make a tender offer—not a tender offer, I'm sorry—move into a merger to gain 100 percent of the outstanding stock in the bank.

Q What is the difference, Mr. Smith, between a tender offer and a merger?

A Well, in a tender offer, the option rests with the

stockholder whether or not they will tender their stock. In a merger, they do not have that option.

Q This particular transaction was which?

A It would be a merger.

Q What discussion was there at the meeting on the [544] 15th?

A Well, primarily one of concern that a proper value, though a value was mentioned, that it was a proper value and how would we go about to evaluate that. It was decided at the meeting to refer it to the executive committee since it was a committee that met on a weekly basis anyway and it would report back to the February meeting.

Q Are you a member of the executive committee?

A Yes, I am.

Q Does the executive committee have certain permanent members?

A Yes.

Q Who are they?

A Mr. Yeonas and I are, and Mr. Beddow and Mr. Drewer and Mr. Erdossy—I am probably leaving out someone—

Q Then it has, I believe, rotating—

A Five directors rotate, serve two months at a time and rotate off and then another five or six will come on. The full committee is 11 members.

Q After the meeting at the board on January 15th, did the executive committee take the matter up that day?

A Yes. There was some discussion as to what we should do at that time, yes.

Q What was that discussion, Mr. Smith?

A Well, how to arrive at—how to determine whether [545] or not the $42 figure was adequate, and it was agreed that we needed outside help, that we should get a consultant on this.

Q Did you then take some action?

A Well, it was pointed out at this time that a consultant had already been retained and had come up with

a value so the committee decided to invite a representative of this consultant, who happened to be Keefe, Bruyette, to come in and make a presentation, at which time based on whether or not we felt the presentation adequate we would determine whether or not we might consider another consultant to represent us.

Q You say to represent you. Was the other consultant representing you?

A No. He had not been hired by us as members of the board of First American of Virginia.

Q All right. And so am I to understand that the executive committee decided to hear from this first consultant at the meeting on the 15th?

A Correct.

Q Did you then attend the meeting on January 29th?

A Yes, I did.

Q Would you please tell the jury what happened at that meeting.

A Well, a representative, Mr. Connor, and another [546] gentleman from Keefe, Bruyette appeared at that meeting and gave us their opinion and the basis on which they had made it.

Q Could you describe what you recall of that discussion?

A Well, the thing that impressed me the most were the credentials of the firm. That in itself to me is critical when you are talking about values, experience and background of a firm. So I was quite impressed with the credentials of the firm, and then when they took the various things into consideration that they had in my mind based on some 30 years of experience of investments of various types, including managing stock portfolios where I am dealing back and forth with stocks, it seemed to me that they have covered it quite adequately. They have compensated for the fact that there was under-valued real estate by the fact that there were also reserves that were under. And I thought it was a very

good figure. In fact I am very comfortable with the figure.

Q Was there any discussion of the transaction on the 29th of January in the absence of Keefe, Bruyette after they were gone?

A After they were gone?

Q Yes.

A Of course there was. I don't at this point remember exactly what the discussion would have been.

Q Did the executive committee act on the matter on [547] that day? The 29th?

A They discussed the Keefe, Bruyette report, of course, and discussed whether or not we should go ahead as has been mentioned earlier and get our own consultant. That subject came up, and one of the directors, and that's one I pointed out earlier, Mr. Yeonas particularly stressed that. But I think most of us were satisfied that it wouldn't be necessary in view of the credentials of the firm and the price that they had come up with and the basis on which they had arrived at that.

Q Did you then arrive at a decision that day in the executive committee?

A Yes, we did, to recommend it to the board at the February board meeting.

Q You were in accord with that decision?

A Yes, I was.

Q Would you tell the jury what happened on the 12th of February?

A Well, we just had a regular board meeting. This bit of information was passed on to the board as a report from the executive committee, though I believe Mr. Drewer made that report for the executive committee if I am not mistaken, saying that the executive committee recommended to the board that this be recommended to the stockholders for adoption.

Q And what action did the board take?

[548] A The board itself then unanimously ratified or acted on and approved the recommendation of the executive committee.

Q Mr. Smith, what were the factors that moved you to first vote in executive committee to recommend the transaction and then in the board of directors to approve it?

A Mr. Stump, my feeling is that the price is extremely fair. The determining factor based on my experience over the years of the price of stock has nothing to do with price earnings ratio, book value, none of these things matter. The only thing that matters in the value of the stock is what somebody will pay for it.

No one had ever paid over $32.50 a share for this stock ever. So $42 was a pretty good price. In fact, it was a very good price.

Q Did you feel pressured by the holding company at any time in the course of the deliberations?

A Not at all.

Q Do you feel that you should respond and do things in a way the holding company might want you to?

A Not at all. I don't need my board seat, you know.

MR. STUMP: I have no further questions.

CROSS EXAMINATION

BY MR. MERNICK:

Q Mr. Smith, good afternoon. I am George Mernick. Just a couple of brief questions, please.

[549] A Yes.

Q It's your testimony, is it not, that as far as you were concerned, the question whether or not the holding company was willing to pay more than $42 wasn't really relevant?

A Not by my—not as I view stock transactions. A fair profit, price was offered and you either took it or you didn't.

Q Do you remember when your deposition was taken, there were some questions about the Keefe, Bruyette fee arrangement, this two-tiered fee structure?

A Correct.

Q And you were asked whether you knew about it, and you said you didn't know about it.

A I did not know about it.

Q You were asked if you thought you should have been told about it, and your response was yes, you thought it was relevant and you should have been told about it.

A Yes, I think I should have been.

Q Do you think you also should have been told about the financial analysis the holding company had done, the famous Mr. Scaffone memorandum?

A Not at all. That's an in-house memo. That's their own private business.

• • • •

TESTIMONY OF GEORGE W. JOHNSON

DIRECT EXAMINATION

[550] Q Would you please, sir, state your name, and address and employment.

A George W. Johnson, 11020 Popeshead Road, Fairfax, Virginia. I am president of George Mason University.

Q Mr. Johnson, are you also a director of the First American Bank of Virginia?

A I am.

Q How long have you been a director of that bank?

A A little over two years.

Q Would you tell the jury, please, in summary terms what you have been doing with yourself the last 20, 25 years?

A For the last ten years I have been president of the University. For ten years prior to that, I was Dean of the College at Temple University in Philadelphia, and before that, [551] I was a professor of English and department chairman and associate dean at Temple.

Q Do you have any relationships with the bank or holding company other than your directorship, your obligations as such?

A No, I do not.

Q When did you learn of the merger transaction that has been the subject of this litigation, sir?

A At the meeting of the full board on January 15th 1987.

Q Would you tell the jury, please, what your reaction was to that proposal when you heard it?

A I was relatively new to the board. I understood what was being proposed. At that point I had little basis for assessing whether this was a fair price, whether it was in the interests of the bank. I looked forward really to the discussion that was going to take place, that proposal having been made.

Q Was there discussion on the 15th of January?

A Yes, there was, both at the board meeting and at the executive committee meeting.

Q First I would like you to tell the jury the discussion that you recall from the board meeting.

THE COURT: We are beginning to get very repetitive, Mr. Stump.

[552] MR. STUMP: Your Honor, I know Your Honor doesn't like cumulative testimony. I could call all these directors. I can conclude with this one and try to be brief. I will do whatever Your Honor wants me to do.

THE COURT: Well, we are hearing the same thing over and over and over. It doesn't become any more convincing when you hear it ten times than the six or eight we have already heard. I think it's getting burdensome on those who have to listen to it.

MR. STUMP: Yes, sir.

BY MR. STUMP:

Q Mr. Johnson, did you come to a conclusion with respect to the $42 price, that is as to whether—did you

come to a conclusion as to whether you could recommend it and could approve it as the price?

A I did at the close of the executive committee meeting on January 29th.

Q What was that conclusion?

A I concluded that it was a fair price, and I was in favor of it.

Q When you say a fair price, what are the considerations—that in your mind weighed in and eventually allowed you to make the decision that it was a fair price and one you would recommend?

A Primarily, the interests of the minority [553] stockholders.

Q Did you look at the minority stockholders as a single monolith, or did you think that there were some interests within the minority that you needed to look out for?

A As with anybody, human beings, I assumed there would be differences in their attitudes and preferences.

Q You attended the executive committee meeting on January 29th, I believe?

A I did.

Q Would you tell the Court and the jury whatever you are able and for any of the three meetings about discussions concerning getting another adviser?

A Yes. There was—my recollection is that that came up at both meetings, that is at both the meeting of the full board and of the executive committee on January 15th, although I may be telescoping those. It was discussed. It was then proposed that we listen to Keefe, Bruyette, and having heard that presentation, arrive at a conclusion as to whether to seek additional advice and information.

Q Were you comfortable with that initial conclusion to hear first from Keefe, Bruyette?

A Yes.

Q You then were among those who heard from Keefe, Bruyette?

A Yes.

[554] Q What decision was then made as to whether you would like to get someone else to do an appraisal and so forth?

A That additional advice was not necessary.

Q Did you concur in that judgment?

A I did.

Q Mr. Johnson, did you make an effort to determine whether you could get more money for the minority shareholders in this transaction?

A As has been testified, Mr. Yeonas asked that question directly of Mr. Beddow. I believe that I followed with another question, although I can't recall the exact phrasing. From his response I concluded that there was no room for any additional movement in that offer.

Q Did you arrive at a judgment at any time as to whether the approval of this transaction was in the best interests of the corporation?

A I did.

Q What was that judgment?

A That it was.

MR. STUMP: You may inquire.

I'm sorry.

BY MR. STUMP:

Q I have been asked by cocounsel to ask whether you were sensible at any time of any pressure from either the holding company or Mr. Beddow in your deliberation or your [555] decision?

A None whatsoever.

MR. STUMP: Thank you.

CROSS EXAMINATION

BY MR. MERNICK:

Q Mr. Johnson, I will be very brief. As you viewed your role in considering this transaction, you regarded

yourself essentially as an arbiter, did you not, to make sure on the one hand the holding company didn't pay too much and on the other hand that the minority shareholders didn't get too little? Is that right?

A I have just testified that I was primarily concerned with the interests of the minority stockholders.

Q But didn't you testify at your deposition that you regarded yourself as having two duties, to protect the majority on the one hand from paying too much and to protect the minority from getting too little?

A I may have.

Q Let me just read you two questions and answers and tell me if that represents your view today. Question: "So part of your duty as you understood it was to make sure that the $42 price was neither too high nor too low."

Answer: "That's right."

Question: "You were in effect an arbiter in the middle to try and see that the buyer didn't pay too much and [556] the seller didn't get too little.

Answer: "That's right."

A Well, I was led into that answer, and today I probably would phrase it my own way as I have.

Q Do you disagree with the substance of the questioning and answers that I just read to you?

A Well, my interrogator used the term "arbiter," and I didn't want to argue with it. Today I think I would.

Q You mentioned that you concluded that the transaction was in the best interests of the bank, the Virginia Bank?

A Yes.

Q What was the basis for your conclusion that it was in the best interests of the bank? What made this a good deal for the bank, the institution?

A Well, it did increase the capital available. I think that in my deposition, I think in the question there was

a shift between a holding company and a bank. I was somewhat confused by that.

• • • •

TESTIMONY OF CLARK M. CLIFFORD

DIRECT EXAMINATION

[561] Q Would you state your full name?

A Clark M. Clifford.

Q What is your occupation or profession?

A I am a lawyer and corporate executive.

Q Would you briefly describe to the jury what your professional background and career in Government have entailed during your career?

A Well, I come originally from St. Louis, Missouri, and I came to the Bar there on June 1st, 1928. I went into the Navy during the Second World War. I came into the Truman Administration in the spring of 1945 and served for over four years as presidential counsel at the White House. I was an adviser to President Kennedy during his term in office and chairman of the Foreign Intelligence Advisory [562] Board. In the Johnson Administration, I was an adviser, and then at the height of the Vietnam War, he asked that I go to the Pentagon, and I became Secretary of Defense.

In the Carter Administration, he used me for foreign emissarial duties. He sent me to Greece. On one occasion he sent me to Turkey, and then sent me to Cyprus when there was a flare-up. And then later when Indira Gandhi became president of India, he sent me to India for a stay to develop relations.

In between times of Government service, I have returned to my law firm. After the Carter Administration went out of office in the end of 1980, I went back to the firm, and in 1982, I then started my relationship with the First American operation and have been with that ever since.

Q What is your position with First American Bankshares, Inc.?

A I am chairman of the board of First American Bankshares, the holding company.

Q And what authority do you exercise as chairman of that institution?

A When the investors asked that I take over the operation of the property, I said to them based upon experience in both Government and industry, that I would accept the responsibility if I had complete authority. They said yes, that's what they had in mind. So as far as the [563] decisions are made by the holding company. First American Bankshares, under that arrangement with the owners, I make the decisions.

Q Mr. Clifford, can you tell us when the holding company first became interested in acquiring the shares of the minority stockholders in the First American Bank of Virginia?

A Well, in a general way, it started early in my relationship with it, which began in 1982. By '83 and '84, we were talking generally about a plan ultimately to acquire the stock of each of our banks in which we did not own the majority. See, we inherited the situation from the old Financial General, and some of their banks, they only owned a part of the stock. But by the summer of 1986, my thinking was that the time had come to give serious consideration to the acquisition of the minority stock in the Virginia Bank.

Q What was the reason that the holding company or you were interested in acquiring the minority in the Virginia Bank and in the other banks?

A There are a number of reasons. Banking is a highly competitive business. Your competitors move quickly, and effectively; and you must be able to do so. If you have a minority interest in a bank, then you may not move as expeditiously as you might otherwise move. You constantly must be concerned about the minority shareholders that you [564] have.

Also, particularly in this area of Washington, D. C., where we have three banks, we are attempting to consolidate the operations of the banks as much as possible. It slows us up in that consolidation, which oftentimes leads to great economies, when we have to stop and consider the fact that in Virginia we have a minority interest. So that all along, we have felt that we would ultimately own all the stock of all the banks.

• • • •

[565] Q Mr. Clifford, you were telling us that your thinking in this area came to some sort of point in the summer of 1986. Is that thinking reflected in that minutes that has been introduced into evidence?

A Yes, it is. By that time, I had reached the point where we were moving in that direction. I wasn't ready to make the final decision, but certainly I wished to explore it extensively and see A, whether it would be done appropriately, and whether or not we would be able to finance it.

Q And what decision was made at that time? How did the company go about exploring it in the summer of '86?

A I suggested to the other members of the executive committee that they continued to be concerned with it and thinking about it, and also either at that meeting or sometime later came up the question of retaining the services of an expert banking firm to give us an opinion. So the ordinary steps that are necessary to accomplish this purpose [566] were going forward.

Q And when you say that you wanted to retain the services of an investment banking firm, what was the point in that? What did you want them to accomplish?

A As I went through the process of reaching the decision regarding a fair price to pay to the minority shareholders, it seemed appropriate to have the benefit of an expert banking firm to advise me in that regard.

Q And did there come a time when Keefe, Bruyette & Woods came up with a price to recommend to you?

A Yes. At a later meeting in January 1987, we had a meeting with them.

I might say that prior to that time, I had been going through a lengthy process in my own mind in reaching my own decision before I ever heard from the banking firm.

Q What was your thinking at that time prior to the time you received the recommendation from Keefe, Bruyette?

A Well, when we reached the tentative decision in the summer of 1986, and over the next six-month period, I gave quite a lot of consideration to this matter. I received memoranda from the holding company. I would discuss it from time to time. I took into consideration a number of factors. The reason I gave it the length of time that I did was because it was my responsibility to make the decision. It was not the board's decision. It was not the executive [567] committee. It was mine and mine alone. I took into consideration a number of factors that my experience led me to believe were valuable in reaching a fair conclusion.

The first element I took into consideration was the market of the stock, and I looked into that with considerable care. I wanted to find out what the trading had been in the Virginia Bank stock, and I learned that in the three-year period that we were talking about that the stock had been traded, traded reasonably actively, and that during the period the price at which it was being traded was between $32 and $33 a share. It did not vary through that whole period.

Sometimes there was more trading than others. I think maybe 1986, there seemed to be really quite a lot of trading in the stock. So I took that into consideration. The reason it was important to me was that if a holder of Virginia stock at that time wished to sell the stock, that's the price that that party would receive when they sold

it or if an estate had to sell it, that's the price they would receive.

Q Mr. Clifford, did Keefe, Bruyette & Woods come and make a presentation to you in January?

A Yes. But if I could, I would like to tell the other factors that entered into my mind—

THE COURT: Why don't you let your attorney guide [568] you.

THE WITNESS: All right. Yes, Your Honor. Yes, Keefe, Bruyette came in January of 1987.

BY MR. CAWLEY:

Q Would you tell us about that meeting, please, sir.

A Yes. We were having a regular meeting of the executive committee, and we had finished two or three items, and then we were notified that the man from Keefe, Bruyette was there; and so he came into the room with his assistant; and they had a number of documents with them, and they then made a lengthy presentation with reference to their attitude regarding the price to be offered to the minority shareholders; and then they were asked some questions, and they advised us of their conclusions.

Q Now, was the decision made at that moment as to whether to go forward with this transaction or not?

A I didn't hear that.

Q Excuse me. Did you make the decision at that time at that meeting to go forward with the transaction?

A Yes. After the Keefe, Bruyette people had left, then we discussed it for a considerable period of time, maybe as much as an hour-and-a-half; and in that discussion, I reached the decision.

Q And what price had you come up with prior to that meeting?

[569] A Well, the figure that I had in mind was $38.

Q And why did you go from $38 to $42 if that was your decision?

A Well, the reason was to some extent based on how I got to the $38. I started with the market price of $32. I took into consideration the fact that the book value was in the neighborhood of some $33. So I added on a factor that had come up regarding real estate that the bank owned that might have been on the books at a lesser figure than it was then worth. I took that into consideration; and then I put in a factor, a loading factor of maybe $2 or so, as a further inducement to the shareholders and to the board to consider the offer a fair one. And that got me up to the $38.

The figure that Keefe, Bruyette came in with was $42.

Q And you decided to accept their recommendation?

A Yes. When I had reached the figure of $38, my associate said, "Well, we might make it $40," and I said, "Yes," I had not considered the $42, but—and I thought it was high—but after Keefe, Bruyette had recommended the $42, then I could not go to $38 or $40 after they once made the recommendation. I couldn't go to the shareholders and say I was going to pay $40 but the adviser said $42. So that pretty well made up my decision for me. And so—

Q What was the next—excuse me, sir.

[570] A So I then agreed at that time in January to make the offer of $42.

Q Can you tell us how that offer of $42 was communicated to the Virginia Bank or its officers?

A Well, at the meeting of the executive committee, at the conclusion of the meeting, I said to Mr. Altmen, who works with me on bank matters, to check in with Mr. Drewer and see if there was a convenient time that Mr. Drewer might come over so that we might visit with him. Mr. Drewer was the chief executive officer of the Virginia Bank.

Q Tell us about that meeting, sir.

A Mr. Drewer came over. I explained to him the fact that for some six months, we had been considering the possibility of making an offer. I told him the mental processes I had gone through. I told him some of the thinking that I also had gone through. I told him I had reached a decision of about $38 and then told him of the meeting with the Keefe, Bruyette people, and that they had come to $42, and I told him that that had settled the matter in my mind and that we were going to offer $42 a share for the stock.

Q What was Mr. Drewer's reaction?

A Well, I remember saying in my deposition, I thought he was delighted. His face seemed to light up when I mentioned the $42. He said that he would take it up with his [571] board. He considered it certainly an offer that should receive the board's consideration. He commented on the fact that it was possibly some $10 more than the market at the time and said that he would discuss it with his board, and keep us advised.

Q Now, after that meeting, what communication did you have with the Virginia board?

A I had none.

MR. CAWLEY: Thank you, Your Honor. I have no further questions.

MR. STUMP: I have none, Your Honor.

CROSS EXAMINATION

BY MR. MERNICK:

Q Good morning, Mr. Clifford. My name is George Mernick, one of the attorneys for Mrs. Sandberg.

Mr. Clifford, you had no discussions with Mr. Beddow between July of 1986 and January of 1987 concerning his discussions with Keefe, Bruyette & Woods, did you?

A I did not.

Q And you don't know what Mr. Beddow said to Keefe, Bruyette & Woods or what they said to him?

A I do not.

Q You don't know whether or not in particular Mr. Beddow told Keefe, Bruyette & Woods a range the holding company had in mind, do you, sir?

[572] A I do not. May I give some additional answer to that?

Q My question is whether or not you know if he said that or not.

A Well, I do not know. I know only that during that period we had not yet reached any decision regarding what we would do on it.

Q Mr. Clifford, you heard Mr. Stevens' testimony that was read to the jury two days ago in which Mr. Stevens said that the members of the executive committee, including yourself, had settled upon a $40 price range in July of 1986, did you not?

A I do not think I heard that.

Q Mr. Clifford, you testified as to the reasons why the holding company wanted to acquire these minority shares in the Virginia Bank; and I take it the same reasons obtained with respect to acquiring the minority shares in the Maryland Bank?

A Yes.

Q The same factors?

A Um hum.

Q And in particular, they were that it would make the bank more competitive, that it would make it easier to consolidate operations? Is that right?

A Yes.

[573] Q Were those the factors that Mr. Scoffone two days ago said were important to him in terms of why he thought this was a top priority?

A Well, if he said that. I'm not sure I heard him say it.

Q But in any event, the senior management of the holding company thought these were the important reasons to acquire all of the interests in the subsidiary bank?

A Yes.

Q Did you receive a copy of Mr. Scoffone's June 11th, 1986 memorandum and the financial analysis that was attached to it?

A Yes. I have some recollection of receiving three Scoffone memoranda, along with other memoranda that came over from the bank to me. But I do remember that.

Q Including the memoranda of June 11th, 1986, that analyzed the financial consequences at prices ranging up to $61 per share, you did receive that?

A I received that.

Q Sir, after your meeting with Mr. Drewer on the 13th of January, 1987, did you discuss with Mr. Beddow the progress of the board's deliberations, the Virginia board's deliberations concerning this acquisition?

A No. I think I did not. That would have been Mr. Altman's function. I think they would have kept him [574] informed of what was going on.

Q Did you give Mr. Beddow any instruction at around the time of January 13th as to how he should conduct himself in these meetings of the Virginia Bank board?

A No, I did not.

Q So you didn't give Mr. Beddow any instructions whether or not he should withhold information or should share information about the data in the Scoffone memo?

MR. CAWLEY: Excuse me, Your Honor. He just said he didn't give any instructions, so that would—

THE COURT: Objection sustained.

BY MR. MERNICK:

Q Mr. Clifford, would you agree with me that the holding company had a duty to give the minority shareholders fair treatment and a fair price in this transaction?

A Oh, yes. I started with that idea from the very beginning.

Q And it's the job of the jury to decide whether or not the people who worked for you did that in this case, is it not?

MR. CAWLEY: Objection, Your Honor. I don't think it's proper to ask the witness what the job of the Judge or jury is.

THE COURT: Objection sustained.

MR. MERNICK: I have no further questions.

[575] REDIRECT EXAMINATION

BY MR. CAWLEY:

Q Mr. Clifford, I just have a few questions. You were asked about whether you knew the circumstances of Mr. Beddow talking to the Keefe representative. Let me ask you this: when the Keefe representative came in to see you on January 9th, did they indicate that it was a price that they were confirming or a price that they had come up with?

A I am not sure I understand the question.

Q When the figure was mentioned to you at $42, was that a Keefe price? Did Mr. Connor indicate that that was their price that they had come up with?

A He did. He said that he had reached that figure after the study that they had given the entire matter.

Q Now, with respect to discussions regarding price, when was the final decision made as to what the price would be?

A The decision was made in that meeting in January of 1987.

Q Could anybody have said what the company's price was prior to that time?

A Well, they could not and have been accurate about it, because no decision had been made, and no price had been set.

Q And you were asked about the Scoffone memorandum. [576] Did that figure prominently in your thinking one way or the other?

A It didn't figure at all in my thinking. If I might explain why. What Mr. Scoffone was doing was preparing a memorandum on the business results of what would

happen if we decided to acquire the minority stock. But it was a good idea to do it based upon business results. That made no difference to me at all. I wasn't concerned with the business results, because I was concerned over the fact that we wanted to get control for the various reasons that we have given. It would make us more economical. It would make us more efficient. It would make us more competitive. So those figures that he mentioned to me had nothing whatsoever to do with any possible price that we would pay for the stock. That was done on an entirely different basis.

MR. CAWLEY: Thank you, sir.

MR. MERNICK: Your Honor, if I may, one question?

THE COURT: Yes.

RECROSS EXAMINATION

BY MR. MERNICK:

Q Mr. Clifford, if I understood your last answer then, what you are saying is that the dominant factors in your mind driving this decision were the benefits to the holding company we have talked about, making it more competitive, about streamlining its operations, about allowing [577] consolidation of the operations of the three banks, right?

A Yes. But don't confine it to that, if you will, sir. Also our concern was paying a fair price to the minority shareholders for their stock.

Q I understand that, sir. Therefore, the financial information that was being presented to you by Mr. Scoffone was on top of or in addition to these benefits to the company's operations that we have discussed, isn't it?

A What I said before was that did not enter into our deliberations, because it was on a different subject.

MR. MERNICK: Thank you, sir.

THE COURT: You may step down, sir.

* * * *

PRESENTATION OF PLAINTIFF'S REBUTTAL CASE
TESTIMONY OF DANIEL T. KRABILL

DIRECT EXAMINATION

* * * *

[580] Q Were you here during the testimony of Mr. Connor of Keefe, Bruyette?

A Yes, I was.

Q Did you agree with his analysis?

A No, I did not.

Q Why not?

A Well, first, I started from the point of view that one share held by Mrs. Sandberg is equal in value to one share held by First American Bankshares. This is the approach that I have used in every single minority share case I have been involved in. It is also the approach that is used in every other minority share case that I am aware of. [581] Stated differently, the minority shareholders own 15 percent of the bank. My approach gives them 15 percent of the value of the bank. Mr. Connor's does not.

Q Did you hear Mr. Connor's discussion about how he was unfamiliar with the dividend discount model being used by others?

A I believe Mr. Connor indicated that in the 70 to 80 cases, mergers and acquisitions that he was involved in, it was never used, yes.

Q Are you aware of the mergers and acquisitions where in fact it has been used?

A Yes. Many.

Q Can you just list some?

A All right. First of all, First Boston Corporation uses it and used it in a number of mergers involving Citizen's Southern National Bank of Georgia. First Boston is one of the ten largest New York investment banking firms dealing with all industries, including the banking industry. Similarly, Morgan & Stanley used it in negotiations with our firm for the acquisition of a bank

approximately the size of First American Bank of Virginia earlier this year. Morgan & Stanley is also one of the ten largest New York investment banking firms.

Similarly, Merrill Lynch used it in negotiations with us on an acquisition. They were representing the seller. [582] We were representing the buyer. Further, Goldman & Sachs uses it. Merrill, Lynch, Goldman & Sachs and Morgan & Stanley and First Boston are all major New York investment banking firms.

Smaller investment banking firms use it as well including Blair & Company in one instance, I was directly involved in in Chicago. Some of the major bank holding companies use it including Citizens & Southern National Bank, Mellon Bank, Bank Corporation and Norwest, all of which would be in the top in the country, if not the top 25.

Further, it is taught in corporate finance courses in colleges and universities and graduate schools throughout the country including the one that both Mr. Connor and I graduated from.

Q And in the deals that you have worked on in which the dividend discount model is used, what is it used for?

A It's used to estimate the value of the target company, the company whose acquisition is being considered.

Q You heard Mr. Connor say that he took into account the absence of a controlled premium, did you not?

A Yes, I did.

Q Did you in your analysis also take into account the absence of a controlled premium in reaching your conclusion?

A Yes, I did. That's why I rejected the approach [583] of valuing this bank on the basis of what other banks and bank holding companies of this size have been sold for in controlled situations in which I estimated a rough price in the $80 to $100 per share range.

Q And you rejected that?

A I rejected that.

Q You also heard Mr. Connor talk about a rights offering in 1986, is that right?

A I did.

Q What significance do you give to the rights offering, if any?

A Well, I view—Mr. Connor indicated that, and I want to find his words, that what happened there indicated that there was a substantial interest in the rights offering on the part of the minority shareholders, but no stampede. I agree that there was substantial interest. The data indicate that there were approximately 2,100 shareholders. About 700 of them were ineligible to participate. They had fewer than 28 shares. They had an investment less than $800. They were not allowed to participate.

Of the remaining approximately 1,400 shareholders, roughly 500 subscribed, roughly 900 did not. In terms of numbers of shares, nearly 60 percent of the shares offered to the minority shareholders were subscribed for. I view that as significant. In any event, of the remaining 40, there are [584] a lot of reasons why they might not have done it. One, they might not have had the money. Another, they had five weeks—particularly the five-week period in which they had to respond to it.

In any event, I don't interpret the fact that roughly 40 percent or a little more than 40 percent of the shares made available to minority shareholders in this rights offering, I do not interpret that, the fact that they were not subscribed to at $30 as justification for a price of $42 being fair to all shareholders or more, stated a little differently, a price of $42 being forced on all shareholders including those that did not want to sell.

Q Were you here when Mr. Connor discussed his conclusion that the Scoffone memo showed a rate of return of less than one percent?

A I was.

Q Do you agree with that?

A I do not.

Q What do you think the Scoffone memo shows about rate of return?

A My interpretation of the Scoffone memo, which was written in May of 1986, or actually the table was done on May 31, '86. The memorandum was written June of '86. Mr. Scoffone did some calculations that indicated that if First American Bank Corporation bought the shares, the [585] minority shares at $61, the accounting impact of that transaction on the income of First American Bankshares would be an increase of $300,000. However, that calculation takes into account the interest paid on the money and some accounting adjustments for goodwill that I don't think are appropriate to use in this case.

My calculations indicate that based on the numbers Mr. Scoffone used—

* * * *

THE WITNESS: Based on the figures Mr. Scoffone used it was a return of 8.4 percent. Based on what actually happened in '87, it would have been a return of 10 percent, if they had acquired it on the last day of 1986.

BY MR. KEENEY:

Q Why does your calculation differ from the calculation that Mr. Connor did on the stand?

[586] A My calculation is simply 15 percent of the earnings of First American Bank of Virginia. In the first case what Mr. Scoffone projected for '86 and the second case, what actually happened in 1987, divided by the $44 million acquisition price for those shares at a price of $60 per share.

Q You heard Mr. Connor talk about what he called the market for stock, did you not?

A Yes, I did.

Q Do you believe that this stock had a market?

A It had a market, yes.

Q What sort of market?

A Well, Mr. Connor referred to that market as a valid market. I would interpret the numbers that Mr. Connor

had as indicating that it was a market that did not reflect the value of the shares.

Q Why was that?

A The shares were trading at approximately a 40-percent discount from what the shares of other Virginia banking organizations were trading at. I thought that indicated the market, I believe that indicates that the market is not an indicator of the value of those shares. I do believe that a dollar of earnings at First Virginia, for example, to its shareholders is worth the same as a dollar of earnings at First American Bank of Virginia to its shareholders.

* * * *

PLAINTIFF'S CLOSING ARGUMENT

[588] MR. HASSETT: Ladies and gentlemen of the jury, welcome again. I am, as you know, Joseph Hassett, one of the attorneys for the plaintiff, Doris I. Sandberg.

First of all, I am sure I speak on behalf of all of us here in the courtroom in expressing to you our very great gratitude for the time and the attention that you have given to a matter which is important to the parties litigating it. I realize it's a very difficult task to be a juror. It is important to all of the parties and their attorneys. I am sure everyone joins me in saying we appreciate very much your attention and your patience with us.

This in a sense is my time to account to you in part for the use of your time, and to account in particular with the things that I told you on Tuesday morning we felt we were going to show through the evidence presented in the case.

The first thing we said that we would show is that the holding company had breached its duty of fairness to Mrs. Sandberg when it paid her only $42 when it took her stock away from her against her will. We told you that the [589] evidence would prove that that was an unfair price.

Yesterday, you got to hear Mr. Connor, who was the expert hired by the holding company, with regard to their effort to convince the people that the $42 was a fair price.

Mr. Connor as you know is the man who was trumpeted to the board of the bank as the man who went off all on his own without anybody suggesting to him any price that the holding company wanted and who sealed himself off and worked by himself and independently came up with this number of $42.

Yesterday, you heard Mr. Connor and he quite candidly said no, from the very beginning he said, and those were his words from the very beginning, Jack Beddow told me that the range was $40 to $42. Mr. Beddow, you saw Mr. Beddow on the stand yesterday. He initially didn't recall that, but he said, well, he certainly didn't intend to tell Mr. Connor the range, but maybe it slipped out.

Once you heard later in the afternoon the testimony of Mr. Connor, it was clear in any event that the $42 number must have come from somebody at the holding company, because otherwise, it would have been the most extraordinary coincidence that Mr. Connor came up with the same number or range that Mr. Beddow and others at the holding company were thinking about and were prepared to pay.

I think the evidence there is very clear that you heard the deposition testimony read of Mr. Stevens, who was [590] the president of the company, the chief executive officer, the day-to-day manager, the man that the holding company designated as the person they wanted to speak on its behalf at a deposition. He said that before Mr. Beddow talked to Mr. Connor, there was a consensus that $40 to $42 was the number.

Now, we don't contend for a moment that Mr. Clifford knew what Mr. Beddow was doing in regard to talking to Mr. Connor. The fact is there, and it's admitted, that the number $42 or the range $40 to $42 was passed on to

Mr. Connor. So that all this suggestion that Mr. Connor and his firm went off and worked on their own to come up with this number as being the pure, fair number just isn't so at all.

As I say, that had to be so, because when you heard the substance of Mr. Connor's explanation as to why he thought $42 was the fair price, there was no rationale or method or analysis to get to the number. The only piece of reasoning in his analysis was that any price over the so-called market price of $32 or $33 was fair. But he had no rational basis for saying that the number above $33 should be $42 as opposed to $52 or $39 or any other number. That was purely his judgment, he said. There is no formula. It's just a matter of judgment, and I will tell you what the fair number is.

[591] Well, it wouldn't have been the most extraordinary coincidence if he is looking into his crystal ball to get the number, came up with the same number 42 that matched the range of $40 to $42 that Mr. Stevens testified was the holding company's range. But you don't have to speculate at how unlikely that possibility is, because Mr. Connor has said the range was given to him, and Mr. Beddow doesn't deny it.

As I say, the only piece of analysis behind Mr. Connor's view that $42 was fair, was his view that any price above the market price is a fair one when a company takes away stock from a minority stockholder against that minority stockholder's will. Mr. Connor justified that by saying that well, that's all that Mrs. Sandberg or some other minority stockholder could have sold her stock for if she had been selling it that day. As you know, Mrs. Sandberg wasn't trying to sell her stock that day. She wanted to hold on to it.

Mr. Krabill explained that in his expert opinion, when a minority stockholder's shares of stock are taken away from her against her will, she is entitled to receive her fair slice of the pie and that the way to value her shares when they are taken from her are to give them the same

value when she holds them as they have when the powerful stockholder who is taking them away holds them.

Therefore, he testified that the way he approached [592] this was to try to value Doris Sandberg's shares as having their own proportionate share of the overall value of the company as a whole. So if there were roughly five million shares, assume that she owned one share, if that share was taken away from her when she didn't want to give it up, Mr. Krabill testified she was entitled to receive her one five-millionth share of the company.

And of course the company, if the company didn't want to give her her one five-millionth share, they were perfectly free not to take away her stock.

Mr. Connor just can't seem to accept the idea of dividing up the pie in equal slices, and when Mr. Keeney asked him yesterday whether his analysis took into account, tried to value in any way a share of minority stock, as though it were a pro rata share of the company as a whole, he sat there and he professed he couldn't even understand it. That kind of question was beyond his ken.

Mr. Keeney, you heard him follow up with another question and said, well, did your analysis determine whether during this freeze-out merger what was taken away from the minority stockholders was equal in value to what the dominant stockholder, the holding company, took? He said no, he didn't. He didn't do that kind of analysis. Obviously, he didn't do the kind of analysis that shows what is the value of a share of stock in that holding company, if it's treated [593] as having its own proportionate share of the whole pie.

The only person who has done that analysis is Mr. Krabill. It's his opinion that that pro rata interest is worth $60. He arrived at that two ways. The first way is looking at that share of stock as the right to receive income in the future, which is the way people think about shares of stock when they are thinking of holding it, as opposed to thinking of selling.

When he did that analysis and he looked at those earnings of the bank, and you heard Mr. Drewer tell you that it was the third year of record earnings in a row and those $5.10 per share earnings in 1986, the promise of higher earnings in the future has real value.

Mr. Krabill calculated that value, and it was $62.80.

Mr. Krabill also did an analysis of peer group banks; and he used the same peer group as we saw when you have the exhibits, Exhibit Z is the letter from an associate of Mr. Connor's to Mr. Drewer stating that the handouts that were given at that January 29 executive committee meeting at the bank, those handouts that Mr. Connor used that day, they had the same peer group from Virginia banks that Mr. Krabill used.

In fact, Mr. Connor did not criticize the way in which Mr. Krabill carried out the methodologies he used. He [594] simply said that it was beyond his ken that anybody would think of valuing a share of stock by any other measure than a market price. It's the only reality we live in, he says, is the market.

He is unique amongst those who spoke on the subject in the course of the case in taking that view. Mr. Drewer didn't take that view. You heard him say that he wouldn't sell his stock at that $33 market price or anything near it. He said he thought the fair value was a lot more than that. And you heard that honest man, Mr. Yeonas, sit there on the stand and say, well, he thought the market price was unfair. The job of his board was to find out how much higher than market it should be to be fair. Those gentlemen didn't think that the only reality we live in is that $32 market price.

Of course, Mr. Scoffone, the treasurer of the holding company doesn't think that either. You will see his memo. It's Exhibit D. It's the memo of June of '86, which right after it was sent to his superiors and the decision to go ahead with this transaction was made, Mr. Clifford called it tentative. Mr. Stevens' deposition said it was a decision that as soon as they read or shortly on the heels of reading Mr. Scoffone's memorandum, they began the wheels turning. They called up Mr. Ewers down there in Richmond and got him to work out a bank's proxy statement before the bank had any idea that the transaction was coming down the track.

[595] When you look at Mr. Scoffone's memo, you will see that he looked at the right to own that 15 percent of the stock of the holding company that the holding company didn't own. That is some market price, $32, the only reality. That wasn't the reality to him. The reality was the income that that ownership, that 15 percent would bring to the holding company in the very first year. He testified here in response to questions from George Mernick. He said yes, his memo, Exhibit D, under the analysis he made showed that the transaction, the acquisition of that 15 percent of the holding company of the bank, that the holding company didn't own, that that would make money for the holding company in the first year if it paid $61 per share for the stock.

Now, Mr. Scoffone, of course he is the chief financial officer, chief accounting officer, treasurer of the holding company. He is the man the holding company employed to do this. He has worked there a long time. It was his job to do this analysis. They asked him to do it. They received it. They acted upon it immediately favorably. You would have thought that he was our expert when you saw him being cross examined on the witness stand. They were all trying to budge him off what he had said. They were trying to suggest he didn't understand his own memo.

They said oh, no, Mr. Altman's deposition was read from first and it tossed off the bon mot that it only [596] showed that you made an admissible return at $45 million investment. Of course, it's obvious from Mr. Scoffone's memo that the $45 million figure he used there was on his assumption borrowed money. His analysis in that memo shows that all the interest was paid on the borrowed money, and still had a profit in that first year.

Mr. Scoffone went ahead further and testified that if you, instead of using borrowed money if the holding company had had investors invest more money, and they didn't use borrowed money, that the value to the company, the profit in the first year would be $3.7 million, not that $299,000. You get the $3.7 by adding the figure for the retained earnings and dividends, a couple of levels above on that exhibit.

Mr. Scoffone wrote that memo. He is the man the holding company had there for the purpose of doing that kind of analysis and he told you from the stand there exactly what it meant. It meant, ladies and gentlemen, that the holding company was sitting there with a memo that showed that buying Doris Sandberg's stock at $42 was a bonanza.

Of course, they are going to tell you that she had a real bonanza because she got this golden opportunity to be given $42 and by the time she paid her taxes, she was way behind. There is no evidence other than Mr. Krabill as to what the pro rata share of Doris Sandberg's stock was, treated as being entitled to share equally in the pie. [597] If you find that a small piece of the pie ought to be treated as fairly as a big piece of the pie, then you will find that Doris Sandberg was entitled to $18 more per share than she was given when her stock was taken away from her when she didn't want to give it up.

Now, you might wonder how could Mr. Connor back at that executive committee meeting of the bank directors in January of '87, how could he have convinced them that he made sense if they all felt as they testified that the market price wasn't the fair value of the stock? And you heard Mr. Connor yesterday say that's the only reality we live in is the market price. But I think, ladies and gentlemen, you will find the answer to that in the testimony of Ms. Orfe and in her notes.

She was there at that meeting when Mr. Connor made his presentation to the directors, and she identified her notes, Exhibit M, the second page, that these were her

notes. Bear in mind this was the same Mr. Connor talking who sat up there yesterday and told you that the market price for the stock was the only reality we live in. And her notes say; rate prices for First American Bank of Virginia FAVB, parent set the price, not an open market, 15 percent held. Little trading.

Her testimony was to the same effect. I won't read all of it, but she said that they acknowledged, Keefe, Bruyette acknowledged the parent company set the price because [598] it is not an open market for the stock, and only 15 percent is held in the open market and there is very little trading.

Mr. Connor didn't tell those directors back in January that their market price was the only reality we live in. He told you that here yesterday because he is looking now for some way to find some objective element to his opinion on $42, which was nothing more than the opinion that the range that Mr. Beddow gave him was okay with him.

Now, the second thing we told you, ladies and gentlemen, that we felt we were going to prove was that the holding company breached its duty to deal fairly with the minority stockholders and with the directors of the bank, whose job it was to look out for those minority stockholders and see that they didn't get taken advantage of.

The one thing that the evidence shows is that the holding company was sitting on both sides of the table. You saw and heard Mr. Beddow, when he was asked something about what the holding company would do, he answered we wouldn't pay any more. We. He was there furthering the interest of the holding company, when he was supposed to be a director of the bank looking out for the minority stockholders, lest their stock be taken away from them at an unfair price.

Once he and through him his employer, the holding company, set on that board of those directors, he and his company, the holding company, sat there through the

board [599] meeting, knowing facts that were highly pertinent to the decision the board was making and having a duty to disclose those, and concealing them.

Mr. Beddow sat there as the directors scratched their head and said, "Is this stock worth $42 or is it worth more?" And he never said boo about Mr. Scoffone's memo. You heard him yesterday tell you why, well, gee, he said, his memo showed a range of 40 to 61, and we were offering 42, and if I showed them that memo, people might accuse me of trying to tell them what a fantastically good deal we were giving them at $42.

Of course, that memo was much more important than that. I have already explained why. The mere fact that the memo says it should be a top priority of the company because of the positive effect on net income, it was highly pertinent information. The analysis showing financial advantage to the holding company at $61 makes it of nearly overwhelming significance to directors trying to figure out was $42 fair.

Now, another thing that the holding company did that breached the duty of dealing fairly with those directors who were representing those minority stockholders, was to steer the directors away from hiring their own independent adviser to tell them what the value of that stock was. You heard the history of what happened here, that in 1985 the holding company was trying to do the same thing with its [600] subsidiary bank in Maryland. It made an offer of $30 a share. That board in Maryland hired its own adviser. Its adviser said no, $37 is a fair price, not $30. The holding company withdrew itself. But it couldn't go away forever. You heard every one of them testify and you heard Mr. Clifford say this morning that there are very, very strong business reasons why the holding company wants to own 100 percent of those stocks, of those banks.

So of course they came back, and when they came back it was with a 40-percent higher offer of $42. Well, I suggest to you that the evidence here shows that the

holding company didn't want history to repeat itself. They didn't want the directors of the Virginia Bank to get their own adviser. So what did they do? They went out and they said, we'll hire an adviser for them. We'll tell the adviser what to do. We'll tell him the number is $42. Then we'll go down and we'll tell the directors, here, rely on him. He is looking out for you.

Of course, what they didn't tell him is that the whole terms of the arrangement were that the adviser would be looking out for the holding company. They didn't show them the letter in which the adviser made clear that it didn't in any sense want any legal responsibility as though it were advising the directors of that bank as to what they should do. And you heard Mr. Connor here say yesterday in showing the [601] level of regard he has for the intelligence of the people in this room. He said all the time I am retained and I have talked to the other side. Well, I suppose he does. He doesn't talk to the other side in the capacity in which the other side is to assume that he is acting on their behalf.

You heard director, Mr. Smith, here yesterday say that he and others he said felt we needed an outside opinion. We needed a consultant to deal with this. This was a need that he felt and his fellow directors felt. And he said it was pointed out to us there was already somebody available, because the holding company for six months had been putting this all in place. The bank directors didn't know, and you heard the deposition testimony of director Ridgely, vice chairman and longtime director of that bank, say this was sprung on us. When it was sprung on them, the holding company had been all prepared to have an adviser in place to say, well, board, this adviser will advise you.

When Mr. Yeonas, who I think everybody recognized as justifying the name I think Mrs. Bradley gave him, or the title the sage of the board, Mr. Yeonas said he pursued the question of hiring an independent adviser. He said he felt powerless. And he asked Mr. Beddow if

we did get an adviser, our own, our own adviser said that this stock was worth more than $42, would the holding company pay more, and Mr. Beddow said we wouldn't. [602] Mr. Beddow and the holding company, his employer were sitting there on the board of directors of the bank. His job and through him the job of that holding company, because it chose to sit on that board through him, was to look out for Doris Sandberg and the other minority stockholders, and not to be arguing against them and deflecting those who were to represent her and the other minority stockholders from doing their duty.

Of course when Mr. Beddow said no, the holding company won't pay more, we won't pay more, he said some of the directors had the impression that the reference was made to the precedent in Maryland, they wouldn't pay more and they withdrew the offer. You heard Mr. Beddow here yesterday say yes, well, true, he didn't tell them that he had on his desk back at the holding company material relating to the renewed offer, which as you know was made at 40 percent higher in Maryland.

And of course the holding company never told the bank either about the formal engagement letter in which Keefe, Bruyette wouldn't take any responsibility for being loyal to the bank directors. Never told about that. The directors of the bank never knew about that letter until their deposition in this case. You heard Mr. Drewer. He at one time confused it with another letter, but he never had seen that letter until I took his deposition and showed it to him. [603] None of the directors knew when they were relying on Keefe, Bruyette & Woods that the fee structure for Keefe was $25,000 to start and $75,000 more if they finished. The only thing between start and finish was getting the directors to agree. The directors didn't know that.

Mr. Yeonas said he thought he should have known that. It should have been told to him.

Mr. Ridgely, you heard Mr. Ridgeley's deposition read. He said sure, it was obvious it gave Keefe, Bruyette financial interest in convincing the directors to take their advice

We have proved that the holding company breached its duty to deal fairly with the directors of the bank and through them with the minority stockholders, and right down to the end of the transaction, they kept breaching that duty, and so you wind up with a situation here that the proxy statement to stockholders, minority stockholders telling them about this merger and telling them the recommendation of their board of directors drafted by a lawyer for the holding company, managed to get to the minority stockholders without the board of directors of the bank sitting down in a meeting and reviewing it.

Mr. Drewer saw it and of course Mr. Beddow saw it. The holding company's lawyer drafted the resolution that the directors adopted at their meeting that said we are approving [604] the proxy materials that are attached to this resolution. That resolution was presented to the meeting, and no proxy materials were there. The directors passed that resolution. The proxy materials went out purporting—you will see it as Exhibit T—to contain the recommendation of the directors. And the recommendation of the directors in Exhibit T, you will see it's exactly identical to the recommendation of the directors in Exhibit S. Exhibit S is the one that Mr. Ewers, the lawyer for the holding company, drafted in July of 1986, months before these directors of the bank ever knew this transaction was coming down the track.

And it contained verbatim what came out the following March as being the reasons why the directors of the bank were in favor of the merger. The board never met and reviewed that. The holding company didn't deal fairly with the directors of the bank, with the minority stockholders.

That recommendation said that the directors approved the merger, voted for it, because they thought it was an opportunity for a high value for the public stockholder. You saw Mr. Cawley yesterday trying to get director V. Smith to say something that would support that claim. Mr. Cawley asked him something about this $42 fair

price, a very fair price. And Mr. Smith said no, not very fair, just fair. Mr. Smith didn't think it was a high value. Mr. Drewer said he approached the whole thing thinking that $40 to $45 was a [605] fair range, and didn't think $42 was a high value.

Many of the directors said the reason they approved the merger wasn't because it was a high value. Mr. Yeonas said he felt powerless. You heard the testimony read of Mrs. Bradley that said I had no choice. Mr. Dewberry, no other alternative. And yet their proxy statement was sent out saying that they are telling the minority stockholders like Mrs. Sandberg that we are recommending this because it's an opportunity for high value.

That proxy statement said on page 16, that Keefe, Bruyette & Woods did not participate in the negotiations, the negotiations in which the price per share was agreed upon.

The defendants are going to try to read that and leave out the word "the," like one of them did in his opening argument. So that only says that Keefe, Bruyette wasn't in negotiations.

Mrs. Sandberg testified she understood that to mean there were negotiations, participated in the negotiations. As a fall-back you have heard them arguing, oh, well, the negotiation occurred, much to everybody's surprise really, when Mr. Yeonas was thinking about whether to hire an outside financial adviser, said to Mr. Beddow that the holding company would pay more if our adviser said it was worth more.

Well, obviously that was the situation, Mr. Beddow, director of the bank, had an obligation to get a higher value [606] for his minority stockholders if his adviser said so. Mr. Yeonas testified he didn't think he was negotiating. He didn't think that was the negotiation. Of course, Mr. Yeonas didn't see the proxy statement until he got it in the mail, same as all the other directors, except for Mr. Drewer and Mr. Beddow.

The proxy statement also said that Keefe, Bruyette was an independent investment banking firm retained to

pass on the fairness of the merger. That's at page 3 in Exhibit T. That's the language that came out of the form, part of it came out of the form. And Keefe's letter was attached with the ambiguous statement that $42 was fair, without saying fair to whom. All the others, Mr. Krabill assembled some good pile of Keefe, Bruyette letters, they all say fair to the person who has retained them to give the letter. That is the way the model form in Exhibit S, Mr. Ewer's model form, that is the way the model form reads, fair to somebody.

The Keefe, Bruyette letter attached to that proxy statement lent itself to confusion as to what it was saying, $42 is fair. It didn't say to the minority stockholders.

Mr. Connor was here yesterday, and he didn't offer you any explanation as to why unlike all those other letters, and unlike, as Mr. Krabill testified, these kinds of letters in his experience uniformly say, his letter in this case didn't say fair to whom.

[607] You heard the directors, a number of them, say, and Mr. Drewer said the real estate had the value in his mind of I think $5 per share. I know that a number of the directors mentioned it. Mr. Connor was here yesterday. He said yes, he thought the real estate had a value of $5 or $6 per share. And the significance of that is that the proxy statement, the form proxy statement that was drafted long before this board knew this transaction was in the works which the board never saw at the board meeting, said oh, this is a high value because it's higher than book. And it didn't say that book, which is just really historical cost of assets depreciated over time, the book didn't include in the case of this bank at least that $5 or $6 per share that Mr. Connor talked about, a similar amount that Mr. Drewer talked about.

I think director Johnson said he felt that you couldn't tell it from reading the proxy statement in that regard whether the price was or was not a high one relative to these other numbers if you didn't know that information about the depreciated value of the real estate.

The directors themselves testified they thought the real estate issue was an important one. It's one they knew something about. That wasn't in the proxy statement.

Of course, the proxy statement trumpeted the recommendation of the board. It didn't say that the board had never seen the proxy statement. The influence and domination [608] of the holding company was sufficient that it could have its lawyers draft the proxy statement, and they could get it by the board. Mr. Drewer would sign it. Mr. Beddow would sign it. The stockholders would get it and was able to get the board to make the mistake of adopting a resolution that wasn't true, a resolution that said the proxy statement attached when it wasn't.

We think we have proved, ladies and gentlemen, that the holding company breached its fiduciary duty to deal fairly with the directors of the bank whose job it was to protect Doris Sandberg and the minority stockholders.

We think we have proved, too, ladies and gentlemen, that the proxy statement was false and misleading in the respects described, and that the holding company participated in its preparation and dissemination, through Mr. Beddow and through its lawyers.

Now, we are down to the directors. There is no question that the directors were sorely used by the holding company and when one thinks about the directors, one thinks in a way of the comment that was made actually not by the director's lawyer but by the holding company's lawyer, Mr. Cawley, here on Monday in his opening statement when he said the complaint made by Mrs. Sandberg was an ugly charge, ugly. And when one approaches in one's mind the question of the liability of the directors, one hesitates because [609] something is ugly here is the ugliness and the burden of those who took advantage of the directors, and yet, certainly cannot be ugly for a woman like Mrs. Sandberg who believes that her stock was taken away from her for far less than it was worth. And who helped her lawyers' develop evidence justifying her to a trial on that charge, to bring that charge before a jury.

In that context, it must be said that however sorely the directors of the bank may have been misused, they accepted the privileges that go with directorships, and they are obliged to discharge the responsibility of directors. Their responsibility here was to protect the minority stockholders, to see that they got a fair price if they were going to be kicked out.

Well, you can't go about telling whether the price is fair or not if you don't come to some sound estimate of what the stock was worth. The evidence shows that the directors, some of them feeling they had no other choice, against their will, pressure, nonetheless went ahead and approved the transaction without informing themselves as to what the value of the stock was.

Certainly nobody ever even asked the question isn't the stockholder entitled to a fair slice of the pie. They went along with the efforts that were made to get them to use Keefe, Bruyette as their adviser, but you know that if [610] you are representing the seller and the buyer comes along and says you want to know what you are selling is worth, if you listen to my man, he will tell you. You know you shouldn't rely on him.

The reasons the directors gave for not getting their own adviser don't make any sense. You heard Mr. Saunders here yesterday, he said, well, if we got another adviser, he would say the same thing. When he went through with Mr. Mernick what happened in Maryland where the other adviser said no, it wasn't worth $30, it was worth $37, it didn't change his view that no, still all the advisers would say the same thing.

Others said, well, it would be too expensive. It would take forever. Nobody knew what the expense would be or how long it would take.

The directors had a serious duty. They took on the responsibility, and they did not discharge them.

We ask you therefore, ladies and gentlemen, to return your verdict in favor of Doris Sandberg in the amount of the difference between the $42 she was required to take

when she gave up her stock and its value, which was $60 per share. And that is an $18 per share value for her 2,442 shares. That amounts to $43,956.

Again, ladies and gentlemen, thank you very much for your attention.

* * * *

EXCERPTS FROM CLOSING ARGUMENT OF CORPORATE DEFENDANTS

[617] Also, it is impossible to say that this proxy statement was confusing. In fact, I think it's very illustrative that Mrs. Sandberg read the proxy statement. She wasn't confused about it. She didn't like the situation and she voted against it. She didn't testify that she was so baffled by the proxy statement that she was tricked into voting for it. She voted against it.

It's also interesting that when I asked Mrs. Sandberg, "Mrs. Sandberg, did you come up with this list of so-called defects?" She said no, she very honestly said no. She said somebody else did. I don't know who came up with that list, but it wasn't Mrs. Sandberg.

Now, these items are involved with such incredible nit-picking. I said at the beginning, what happened here was that somebody who made the list, obviously went to the proxy statement with a microscope and tweezers and tried to say, well, here's a work—we can argue that this is ambiguous. Maybe this is deceptive. Mrs. Sandberg obviously didn't think that but maybe we can convince somebody else that that's [618] the case and then try to convince that the holding company acted in bad faith with respect to this, that a reasonable person would change their vote. Well, Mrs. Sandberg didn't, and that the holding company had substantial participation. Then maybe we can have the holding company somehow be legally responsible for these little defects that we think we have found.

Now, these arguments are really absurd. For instance, the word "negotiation." The word negotiation means discussion and it doesn't appear in even you'll see in the proxy statement, look through it. It has a description of the merger. It doesn't appear in there. What it does do is this. When you get to the part that says the role of Keefe, Bruyette & Woods, it explains exactly what the role of Keefe, Bruyette & Woods was. And it just has a little boilerplate language that says Keefe, Bruye"e & Woods did not participate in the discussions that led to the price.

Well, they did not participate in any discussions either at the holding company level or the Virginia board with respect to how the price was going to be set so it's true.

It says in the proxy statement the second thing is that the offer allows the shareholder to get a high price for their shares. And right below that it explains the relationship between the price offered and book and market so that any reasonable shareholder can make up their own mind with [619] respect to that decision.

They then incredibly say somehow the role of Mr. Beddow was not described. It's typical of these kinds of charges. In fact, Mr. Beddow's role was clearly explained in the proxy statement. He signed the proxy statement as the president of Virginia Bankshares, Inc., and it says that, clearly, I think on page 8, that he is the executive vice president and secretary and the director of First American Bankshares, Inc. It says it right in the list of who the directors are. It gives their affiliations. It's a very strange charge.

And then the other one is that the buyer, they are charging somehow there is an an obsession on this, that the buyer, it wasn't clear that the buyer had the voting power to elect the directors. It says right in the proxy statement on pages 2, 7 and 15, that First American Bankshares owns Virginia Bankshares, Inc., that there is one vote per share and that it's an 85-percent shareholder with FABI and it also says on page 15 that FABI is already in a position to control the bank.

How could anybody say there was something deceptive that somebody reading the proxy statement didn't realize 85 percent of the stock was owned by the holding company? It would be impossible to conclude that.

The next charge was that an independent investment [620] banking firm had been retained to pass on the fairness of the merger. They say that is deceptive. Ladies and gentlemen, the actual opinion addressed to the holding company is attached to the proxy statement. So no one could be in any way deceived. It's obvious, and the language is clear in it that it's addressed to the holding company and they give their view as to fairness.

It's incredible nit-picking but there is only one purpose. It's to try to figure out some way to get the big holding company somehow involved in this matter. It's the same thing they tried to do with the directors. Mr. Stump will tell you about the position of the directors.

* * * *

EXCERPTS FROM CLOSING ARGUMENTS OF INDIVIDUAL DEFENDANTS

[635] Now Mr. Cawley, I think, covered almost all the proxy materials, the substantive allegations that were made pretty well. You may or many not remember that in my opening [636] argument I went through all six of them.

I told you what the allegation was. I told you what the facts were. I hope you can see then that if what I said was right, there wasn't anything to it. Exhibit T, the proxy materials, will be in the jury room with you. If you have any doubts about any of them, you can consult the exhibit. You can see whether there is anything to it. And I am not going to repeat the four matters that I thought Mr. Cawley covered, that is, a matter that does it show that the holding company controls the bank, does it show that Mr. Beddow had influence over the board of directors? Does it show that, was there a claim that there

were negotiations, and if there was, which is highly doubtful, were there any and one other matter that I am not thinking of at the moment.

The two that he may not have covered are the ones relating to the claim that the directors, instead of giving the statements kept in accordance with generally accepted accounting principles, should have made comment on them and said, we have real estate that we think is worth more than what is on the books of the bank.

Now, ladies and gentlemen, you heard the testimony from both of the experts, Mr. Krabill as well as Mr. Connor, that there were a number of factors that either raised or lowered the books of the bank kept in accordance with generally accepted accounting principles and that it wasn't [637] material. Mr. Connor flatly said it wasn't material to him, and Mr. Krabill in the same, to the same effect said it wasn't material to him, because Mr. Krabill didn't consider the book value material; so that that certainly is not a defect.

The other final leg of the alleged violation of the securities laws, and that is a very serious charge to make against directors who are in the sort of businesses that these gentlemen are in, was the charge that the proxy materials said that the offer allowed the public shareholders to achieve a high value for their shares. You don't have to be an economist or banker or a lawyer to be able to see that when this is what your shares are worth and this is what you can get for them, that's a high value for your shares.

I will move in the hope that I have not omitted something that I should have discussed with you about proxy materials, since I think Mr. Cawley did, to the question of whether there was a failure on the part of the board to discharge its fiduciary duties. As mentioned they heard of it on January 15th. You heard over and over again and I think everyone agreed, and I don't think there is any dispute about it, that the first thing that they thought was, all those who testified, I believe, reacted,

either let's be sure this is okay, or this a fair, generous, advantageous, favorable price. Those were the different words that [638] different people.

Nonetheless, conscious of their duty to the minority shareholders, and once again no dispute, every single director has so stated, I don't even think my friends at Hogan & Hartson are disputing it. Conscious of that duty, they considered how will we proceed to deal with this matter? And they determined very logically, rationally and in good faith, we will turn it over to our executive committee, which meets every week and which runs the bank in between our full board meetings which happens every month.

The first deliberation was that very same day. One of the first things ~~they thought~~ about was this issue which the lawyers for the plaintiff say is one of their, if not their only major mistake, was do we need to get an independent outside appraisal of shares or opinion of value to guide us in our deliberations?

* * * *

[650] Now, ~~to return~~ to what I said from a standpoint of more money and tax timing, this is a case in which Mrs. Sandberg's $82,000 worth of stock was snatched away from her for excess of $100,000. And she didn't like, not the price, but the fact that since she had a 90-percent gain in it, she wished it had been done the previous year when the taxes were lower.

It is also a case involving duty and honor, and you heard from these directors, Exhibit T, which you will have out in the room with you and which I ask you to look at, will show you who those directors are, how long they have served, how many shares they own, what other forms of business they are in, and I will ask you to make a determination whether you think that these directors could have been tricked or bullied into being faithless to the minority.

And one other thing will be back there. You will have Exhibit 2, which shows that of the 750,000 minority

shareholders, only 70,000 voted against this transaction. Over 90 percent of them either went along with it quietly or voted in favor. So I will ask you, as you discharge your [651] duty to do justice, please find a verdict in favor of these honorable men and women that I represent.

* * * *

EXCERPTS FROM TRANSCRIPT OF BENCH CONFERENCE, SEPT. 29, 1988

* * * *

[4] While you are here, though, so I don't have to bring you back up here, I will tell you about the charge. I am generally going with the plaintiff's suggested charge. I don't think there is any waiver or estoppel argument the defendant can make, nor am I going to submit to the jury the question that reliance has to be proved. I don't think there is any evidence to support a punitive-damage instruction. But with those general positions, let me tell you which of the plaintiff's instructions I will allow.

MR. CAWLEY: Excuse me, Your Honor. You are allowing this list?

THE COURT: Yes. Not one. I will give my own boilerplate credibility of witnesses, burden of proof, definition of preponderance of evidence. So the plaintiff's instructions, special instructions that I will give are 16. I will not give 17. I think introducing the regulations is just confusing. I have got some 50 instructions offered by one side and 30-some on the other. I am trying to pare this down.

Of the plaintiff's, I will give 16, 18, 19, 20, defendants' instruction 14.

MR. CAWLEY: Excuse me, Your Honor. Could you indicate which defendant instructions?

THE COURT: One of them didn't even number them.

[5] MR. CAWLEY: That is our xerox, Your Honor

THE COURT: Fifteen. I am going to give plaintiff's instruction 22, without the initial paragraph, and its

instruction 23 with the addition that the defendants deny that there are omissions.

MR. CAWLEY: Excuse me, Your Honor. Are the instructions with respect to the 14(a) assertions, is there going to be an instruction on each one of the purported six areas?

THE COURT: No. I know the defendants have done that, taken each one, but I am not going to do that.

Defendants' instruction 11, I will give, omitting the last sentence. I will give plaintiff's instruction 25 omitting the first paragraph, plaintiff's instruction 26, plaintiff's instruction 27, with the addition the defendants deny that there were negligent acts, plaintiff's instruction 28, 29, which is the one that says reliance is not necessary.

MR. VIETH: Your Honor, I am sorry. The use of "freeze-out"?

THE COURT: I am not going to "freeze-out" every time "merger" is used. As a matter of fact, I am not going to use the term "freeze-out" in any of these instructions.

MR. VIETH: Thank you.

THE COURT: Thirty, plaintiff's instruction, 31, 32, [6] 33, 34—

MR. STUMP: I am sorry. After 31, what is the next one?

THE COURT: 34, 35. I am inserting in the finding instruction 35 where you talk about injured by the breach, I am inserting damaged as proximately the result of the breach. That probably appears in other parts of the instructions; 36—

MR. SAYERS: Are you eliminating the last paragraph of instruction 36, Your Honor?

The COURT: No. I am eliminating the word "candor", because I don't think that is an issue. Defendants' instruction 31, plaintiff's instruction 37, plaintiff's instruction 41, 46—

MR. MURPHY: I am sorry, Your Honor. That was 41?

THE COURT: Yes. 46, 47, Defendants' instruction 31.

MR. STUMP: 31?

THE COURT: Yes, sir. Defendants' instruction 32, which is the one that says that each defendant should be treated separately. I am going to comment on the evidence, however, and tell the jury that while that is theoretically true, and while it is their recollection that counts, it seems to me appropriate for them to consider shares as one.

[7] MR. CAWLEY: Yes.

THE COURT: And also that with the exception of Beddow, the other defendants probably, individual defendants, probably sink or swim together. There is a slight difference with Beddow, but otherwise, the defendants seem to have been treated pretty much the same and have acted pretty much the same. That is going to be a comment. The jury is not bound by that. I think that is the truth of the matter.

MR. HASSETT: Yes, sir.

THE COURT: To have them try to wade through whether Mr. Thomas, Mr. Smith, or either Mr. Smith or Mr. Yeonas was somehow responsible for less than the others is not appropriate. That is what I would add to the defendant instruction 32.

On the question of damages, I am just going to say that the measure of damages, if they find that the defendants or any one of them are liable on either of these or both of them, is the difference between what she received and what they find she should have received.

MR. MURPHY: Your Honor, I would respectfully disagree with that. I think the issue is not here whether or not she got a full price, it was whether it was a breach of fiduciary duty—

THE COURT: I say if they find they are liable on Counts I and II, then and only then do they proceed to the [8] question of damages; and the measure of damages is the difference in what they find she did receive and

what she should have received had there been no breach or violation.

MR. CAWLEY: Thank you.

THE COURT: If that results in what is fair, so be it—

MR. CAWLEY: I want to join in Mr. Murphy's comments.

MR. MURPHY: Your Honor, I would have another suggestion on damages—the Glass Case—could you instruct them as to the discounted value of a minority share under Virginia law?

THE COURT: No.

Do you all want to call your rebuttal testimony?

MR. HASSETT: Yes.

THE COURT: Then we will take a short recess, and then we will hear closing arguments.

MR. STUMP: The motions obviously, Your Honor, is not granting, but I would like the record clear we do at this time move for directed verdict on the ground as previously stated on Count I and Count II and on the additional grounds that there is no evidence of any price of $42 and that the evidence of Mr. Krabill under governing law is not appropriately to be received because of the Glass Case and because of the Lucas against Pembrook Case, which established that under [9] Virginia law there is not a sharing of the equal treatment truly. It is not either mandated or proper.

MR. CAWLEY: I join in that, Your Honor..

THE COURT: So you don't have to come back and do that, I will treat this as having been made after the rebuttal case is put on. When they are finished, the motions will be denied.

MR. CAWLEY: Your Honor, I guess since Mr. Keeney raised this—it is Mr. Krabill again—was there anything new brought up by Mr. Connor that would permit recalling him?

THE COURT: Well, I am going to hold their feet to the fire. If it isn't rebuttal, I won't permit it.

MR. KEENEY: Absolutely, Your Honor.

THE COURT: But I am aware of that.

All right.

(Thereupon, the conference at the Bench was concluded.)

EXCERPTS FROM JURY INSTRUCTIONS

* * * *

[13] The plaintiff, Ms. Sandberg, in this suit claims damages against the defendant on two theories, two counts. Count I is her complaint that the proxy statement, which was dated March 25, 1987, and sent by the First American Bank to its stockholders announcing an annual meeting on April 21 to vote on the proposed merger was false and misleading and a violation of the Federal Securities laws.

Count II is a count against all the defendants, and it asserts that all of the defendants violated their duty of loyalty to the minority stockholders in breach of their fiduciary duty owed by them to the minority stockholders.

The defendants deny the allegations of these or these allegations and these assertions. The defendants, and each of them, contend that the proxy statement contained no misleading omission or misrepresentation; and they say further that all of their fiduciary obligations were performed.

You are told that insofar as this merger is concerned, it is specifically permitted by Virginia law upon the approval of the board of directors of the bank and approval of two-thirds of the shareholders' votes.

The law in Virginia pursuant to which this merger was carried out, allows the corporation to effect a merger which requires minority shareholders to give up their stock in a corporation. Therefore, you are not to draw any adverse inference from the mere fact that the merger took place, even [14] though Ms. Sandberg was unwilling to voluntarily give up her stock interest in the bank.

That the law allows such a merger, however, does not relieve the defendants from their obligation to comply with the Federal Securities laws with regard to disclosure and proxy statements, nor does it permit any violation of any fiduciary duty that these defendants owed to the plaintiff, and I will outline them in just a minute.

Count I, which is the Federal Securities law allegation of wrongdoing, alleges that the March 25, 1987 proxy statement violated Section 14(a) of the Securities and Exchange Act of 1934. Section 14(a) of the Securities and Exchange Act of 1934 relating to proxy statements provides in part as follows: it shall be unlawful for any person by the use of the mails or by means or instrumentalities of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorized or with respect to any security registered pursuant to Section 12 of this title.

In order to prevail on her claim under the Federal Securities laws, the burden is on Ms. Sandberg to prove each of the following elements by proof by a preponderance of the evidence: first, that there must be in the March 25, 1987 [15] proxy statement a false or misleading statement or an omission of fact that is found by you to be material, as I will define material for you in a minute; second, those individuals and entities responsible for issuing the proxy statement of March 25 must have acted negligently as I will define that term in just a minute; third, issuance of a proxy statement was an essential link in the accomplishment of the transaction; fourth, Ms. Sandberg suffered damages as a proximate result of the defendants' conduct; and the fifth, sixth and seventh issues, which must be proved but which really there is no question about, are, that the proxy statement was a communication that solicited the shareholders' vote

and was mailed to one of the stockholders, sixth that the solicitation was in respect of a security that had been registered pursuant to Section 12 of the Exchange Act, and seventh, that the plaintiff owed one or more shares. There is no real issue about that.

The last is that any or all defendants solicited or permitted the use of their names to solicit proxies in the March 25, 1987 statement.

The test for determining the materiality of a misstatement or an omission from a proxy statement is that a fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote. It does not require proof of a [16] substantial likelihood that accurate statement of fact or disclosure of the omitted fact would have caused the reasonable investor to change his vote.

What the standard does contemplate is a showing of a substantial likelihood that under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of a reasonable shareholder.

In this case, the alleged misrepresentation or omission claimed by Ms. Sandberg in Count I, the Securities count, are these: first, she asserts that the proxy statement failed to disclose that the defendant buyer had the voting power to elect all the directors recommending the transaction and had exercised substantial influence and control over the directors with respect to their recommendation in favor of the merger.

She asserts that the statement that the directors approved the merger, quote "because it provided an opportunity for the bank's public shareholders to achieve a higher value for their shares" end quote, was false or misleading, because the claimed high values for the shares was not the reason for their approval and it was misleading to state that the value was high without disclosing that the bank's real estate was worth at least $6 more per share than the stated book value.

The third alleged misrepresentation that Ms. Sandberg asserts is that the proxy statement falsely [17] stated

that there were negotiations as to the price per share when in fact there were no negotiations as to the $42 per share; fourth, that the proxy statement falsely stated that Keefe, Bruyette & Woods, the investment banking firm hired by the buyer was independent and had passed on the fairness of the merger.

The fifth alleged misrepresentation or omission that is alleged is that the proxy statement failed to disclose that the value of the stock was far greater than the market or book values referred to in the proxy statement, and in particular that management knew that the value of the real estate was understated by $6 per share.

And lastly, the allegation is that the proxy statement failed to disclose that the defendant Beddow was an officer and director of the buyer.

The defendants either deny that these were not disclosed or say that even if they weren't they were not material omissions or misrepresentations. In order to establish then the first essential element under her Federal Securities Act claim, Count I, Ms. Sandberg must prove by a preponderance of the evidence first that the defendants made one or more of the misrepresentations of the fact as alleged or omitted to state facts which would be necessary to make other statements by the defendants not misleading to the plaintiff. And second, that the misrepresentation or [18] omission involved material facts as I have defined that term.

In determining whether a statement concerning a given material fact was true and accurate, the truth and accuracy must be evaluated on the basis of the circumstances that existed at the time the statement was made. In other words, a statement regarding a material fact may not be held false or misleading merely because subsequent events proved it to be erroneous. In determining whether a statement in any proxy solicitation material is misleading, you may assume that reasonable stockholders have a general understanding of the business world.

Disclosure means a fair and adequate statement which conveys to a reasonable shareholder the true state of affairs of a company offering shares of stock or offering to buy shares of stock.

In considering whether a given material fact has been fairly and adequately disclosed and not misrepresented, you are instructed that the statement need not contain minute details but the thrust of the disclosure obligation is satisfied if sufficient details are provided in reasonably understandable language or figures so as to make the import of the disclosure understandable to a reasonable shareholder.

The third I believe standard element is that the defendant must have acted negligently. Negligence is the doing of some act which a reasonably prudent person would not [19] do or the failure to do something that a reasonably prudent person would do, actuated by those considerations which ordinarily regulate the conduct of human affairs. It is in other words the failure to use ordinary care under the circumstances in the management of one's person or property or of agencies under one's control.

Ordinary care is that care which reasonably prudent persons exercise in the management of their own affairs in order to avoid injury to themselves or their property or the personal property of others.

In this case, the alleged negligence by the individual members of the board of directors with regard to the alleged mistakes and omissions in the proxy statement are and include the following: one, the failure to read the proxy statement prior to the transmission to shareholders; second, reliance on the buyer, First American Bankshares, to prepare important portions of the proxy material; third, adopting a corporate resolution prepared by First American Bankshares' counsel which falsely stated that the board of directors of First American Bank had approved preliminary proxy material presented to the directors' meeting on February 12, when in fact

no such materials were presented at that meeting; four, failure to approve for inclusion in the proxy statement any statement of reasons for approving and recommending the merger; but instead permitting First American Bankshares to [20] write the reasons in the proxy statement and attribute these reasons sight unseen to the board of directors of the bank.

The defendants deny that these either occurred or were negligent.

The fourth element under Count I that Ms. Sandberg must establish is that the conduct of the defendants proximately caused the damage to the plaintiff. In order for an act or omission to be considered a proximate cause of damage, it must be a substantial factor in causing the damage, and the damage must either have been a direct result or a reasonably probable consequence of the act or omission.

In order to satisfy this element, the plaintiff need not prove that the defendants' conduct was the only cause of the plaintiff's damage. It is sufficient if you find that the actions of the defendants were a substantial and significant contributing cause to the damage which the plaintiff asserts she suffered.

The plaintiff in her claim sues not only the individual directors but also as I have indicated sues Virginia Bankshares Incorporated and First American Bankshares. If you find that those two defendants or either of them had a substantial participation in the proxy solicitation, such as by preparing or causing the preparation of the proxy material, reviewing drafts, or allowing their name to be referred to by name in the proxy material in connection with the proposed [21] transaction in a substantial capacity, the defendant Bankshares, First American and Virginia, can also be held liable for any material misstatements or omissions of material in the proxy statement if as I have previously stated, you also find negligence or intentional conduct by them, and if you find the March 25 proxy statement was an essential link in

the accomplishment of the transaction, and if you find further that Ms. Sandberg suffered damages as a proximate result of these acts.

With regard to the plaintiff's claim based on the Securities Act, Ms. Sandberg contends further that the defendant Virginia Bankshares as the holder of 85 percent of the stock of First American Bank, controlled First American Bank of Virginia, and that defendant First American Bankshares Incorporated as 100-percent owner of Virginia Bankshares, controlled both of them.

With respect to control, the Exchange Act provides in part that every person who directly or indirectly controls any person liable under any provision of the Act or of any rule or regulation promulgated thereunder shall also be held jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action.

[22] If you find therefore that the defendants Bankshares company were at all relevant times controlling persons of the bank as defined in this Exchange Act, then First American Bankshares or Virginia Bankshares Incorporated shall also be jointly and severally liable to the same extent as the control person or entity unless you find that those entities, that is the Bankshares companies, acted in good faith and did not directly or indirectly induce the act or acts constituting the violation under Count I.

The plaintiff alleges that the conduct of the two holding companies was negligently or intentionally wrongful with respect to the proxy statement of March 25 in the following participation which she alleges: first, she alleges that representatives of the holding companies prepared or directly or indirectly participated substantially in the preparation of the proxy statement, which con-

tained the six alleged misstatements or omissions that I have previously set out that she has alleged.

Second, that counsel for the holding company prepared the proxy statement in draft form in the year before the merger was even disclosed to the bank and that at that time drafted the reasons in advance with the anticipated approval of the merger by the bank, and the bank's board of directors and never sought or received a statement of the real reasons why the board of directors of the bank approved the [23] merger but instead wrongfully permitted the July 1986 draft reasons to be sent to the Bank shareholders as the real reasons of the bank's board of directors.

The defendants deny that there was any wrongful participation in those matters.

It is not necessary for the plaintiff, Ms. Sandberg, to establish a separate showing of reliance by her on the material misstatement or omissions if any in the proxy statement. Nor is it necessary for her to show that her damage resulted from any individual reliance on her part on any particular statement in the proxy statement. If you find that there are omissions or misstatements in the proxy statement, and that these omissions or misstatements are material, a shareholder such as Ms. Sandberg has made a sufficient showing of a causal relation between the violation and the injury for which she seeks redress if she proves that the proxy solicitation itself rather than the particular defect in the solicitation material was an essential link in the accomplishment of the transaction.

If you find that it was necessary for the bank to solicit proxies from minority shareholders in order to proceed with the merger, you may find that the proxy solicitation was an essential link in the accomplishment of the transaction.

If you find that there were misstatements or omissions from the proxy statement and that those were [24] material, as I have defined that term, and if you further

find that the defendants or some of them were negligent in permitting the distribution of the proxy statement with material misstatements or omissions and you further find that the proxy solicitation itself was an essential link in the accomplishment of the merger transaction, then you are instructed it is no defense that the votes of the minority stockholders were not needed to approve the transaction.

Count II is the allegation, the assertion by the plaintiff, that the defendants and all of them violated their fiduciary duty owed the plaintiff as a minority stockholder.

The issues in that count are first, did the defendant or any one of them breach any fiduciary duties to the plaintiff, Ms. Sandberg, in her capacity as a minority shareholder?; second, if the plaintiff is entitled to recover, what is the amount of those damages which proximately resulted to her as a result of any breach?

The defendant Virginia Bankshares Incorporated as the holder of 85 percent on the stock of the bank, because of its representation on the board of directors of First American Bank of Virginia, through its officer and director, defendant Beddow, owed fiduciary duty to the minority shareholders of First American Bank; and for the same reason that the First American Bankshares owed a fiduciary duty to the minority shareholders of the bank.

[25] Ms. Sandberg contends that the defendants' holding companies breached the fiduciary duties to the plaintiff as minority shareholder in connection with the merger including the duties to deal fairly with First American minority's stockholders and the duty to pay a fair price for the minority shares. She further contends these two defendants breached these duties by dealing unfairly with the bank shareholders as to the timing and structure of the merger, by failing to reveal information with respect to the merger and the fairness of the prices while participating in First American's deliberations through their representative director Beddow, and by forcing plaintiff

to terminate her stock ownership in First American Bank at an unfair price.

You will find your verdict for the plaintiff on Count II against the holding companies if you find one or both of them breached a fiduciary duty to Ms. Sandberg as a minority stockholder of the bank and that she was injured as a proximate result of that breach of fiduciary duty.

Ms. Sandberg also contends in Count II of her complaint that the individual director defendants of First American Bank breached their fiduciary duty owed to her as a minority stockholder. Because of the power that officers and directors of a corporation have over the property of stockholders, the law imposes fiduciary duties on them to act with care and loyalty in their dealing with the stockholders.

[26] Under Count I, the standard to be inquired into and required of the defendants is negligence. That is not the standard under Count II. In determining whether each of the director defendants has satisfied the standard of conduct which I have outlined to you with respect to the issues raised by Count I, I instruct you that your inquiry is limited solely to a review of whether each of the directors made a business judgment in good faith, acting in what she or he believed was the best interests of the bank. You are not to measure each director's actions against the standard of care an ordinarily prudent person would be expected to exercise under the same or similar circumstances which is the negligence standard, or to consider even whether the director has acted in haste or reached a decision which resulted in poor judgment, a lack of sophistication, bad luck, ineptness, unreasonableness or negligence, so long as you do not conclude that the director in the exercise of his or her business judgment failed to act in good faith.

The general duty owed by a director is governed by the Virginia Code, and it states that a director shall discharge his duties as a director including his duties as a

member of a committee in accordance with his good faith business judgment of the best interests of the corporation. Unless he has knowledge or information concerning the matter in question that makes reliance unwarranted, a director is [27] entitled to rely on information, opinions, reports, or statements including financial statements and other financial data, if prepared or presented by one, one or more officers or employees of the corporation whom the director believes in good faith to be reliable and competent in the matters presented; two, legal counsel, public accountant or other persons as to matters the director believes in good faith are within the person's professional or expert experience; or three, a committee of the board of directors of which he is not a member if the director believes in good faith that the committee merits confidence.

A director is not liable for any action taken as a director or any failure to take any action if he performs the duties of the office in a compliance with the section, and that section is the one I just read to you.

A person alleging a violation of this section has the burden of proving the violation, and that burden is to prove it by a preponderance of the evidence.

Ms. Sandberg contends that the individual defendant directors of the First American Bank breached their fiduciary duties to plaintiff by approving and recommending the proposed merger without taking the steps necessary to make an informed, deliberate judgment in good faith as to the fairness of the merger terms. Ms. Sandberg contends that the directors approved the $42 merger price proposed by the buyer [28] in reliance on the investment adviser retained by the buyer, without conducting an independent investigation of the adequacy of the merger terms, without retaining an independent adviser to advise the board of directors as to the value of the minority stock and fairness of the proposed merger terms or otherwise informing themselves of the pertinent facts and without negotiating with the holding companies to improve the merger terms.

The defendants on the other hand deny that they breached their fiduciary duties in any of these capacities. They say instead that they acted in good-faith reliance on the investment adviser and that they did in good faith exercised their best business judgment.

You will find your verdict for the plaintiff and against the individual defendants if the plaintiff has proved by a preponderance of the evidence that that individual director breached a fiduciary duty to the plaintiff by failing to act in accordance with good-faith business judgment of the best interests of the bank and that Ms. Sandberg was injured as a proximate result of that breach of fiduciary duty.

A slightly different claim is made against the individual defendant Beddow in addition to the claim which is similar to the claim made by the plaintiff against him which is similar to the other defendants. The duty of—in that regard, the duty of loyalty requires that a director not place [29] himself in a position in which any personal interest conflicts with his duty of the corporation. The plaintiffs, Ms. Sandberg has made a very specific allegation against the defendant Beddow, that he breached his fiduciary duty of loyalty to the minority stockholders of the bank by voting to approve the merger and by assisting in obtaining the approval of his fellow directors, despite a conflict of interest between one, his interest as an officer and director of the holding companies in forcing out First American, the bank's minority at the lowest price possible on the one hand and his duty as a director of First American to insure that the minority stockholders received a fair price for their stock on the other hand.

She also contends that the holding companies are equally responsible to her for this claimed breach of the duty of loyalty, because Beddow was acting on behalf of those companies while sitting as a director of the First American Bank of Virginia.

In this regard, the defendants deny that there was any such conflict of interest. They contend that it was a

full disclosure to both the other directors and to the stockholders, and therefore, Mr. Beddow says nothing should be recovered against him on that specific claim.

Mr. Beddow is not liable on that claim by reason of his dual responsibilities if you find either one of the [30] following to be true: either that the material facts of the merger and Mr. Beddow's interest in it if any were disclosed or known to the board of directors and the board of directors approved the transactions, or that the material facts of the merger and Mr. Beddow's interest in it if any were disclosed to the minority stockholders of the First American Bank and they approved of the merger or that the merger was fair to the bank.

You are instructed you must separately determine the liability of each director and of each corporate defendant. Each director is solely responsible for his or her own actions. You should not find one or more of the directors liable for the actions of the other.

I would like to comment on this to this extent, and my comment is based on my recollection of the evidence and it's your recollection that counts so you can disregard this comment, but it seems to me that First American Bankshares and Virginia Bankshares are really one and the same. And while it is theoretically possible to treat them differently, I would not linger long on that if I were you. It seems to me that they are really one and the same.

In addition, the directors perhaps other than Beddow, are basically all treated alike. It seems to me that they sink or swim together. Mr. Beddow is a little different than that, but basically, the directors, except for Mr. Beddow [31] ard perhaps him, too, really should be treated alike.

The form of verdict which you will have will give you all the alternatives that you will have in your consideration. It will allow you to find separately for Count I and separately for Count II. You can find against one or all of the defendants, or you can find against none of the

defendants, and that is true in both Count I and Count II.

The fact that I have provided blanks for finding against any one or all of the defendants is not to be considered by you as any intimation that I think you should find one way or another. That's up to you. But the alternatives are here.

If and only if you have found against any one or more of the defendants on one or both of the counts, then you should proceed to the question of damages. The measure of damages in this case is the difference between what the plaintiff received for her stock, $42 and what she would have received had there been no breach of fiduciary duty or violation of the Securities laws by any defendant or defendants that you have found to have committed either of those acts. Damages are not presumed nor may they be based upon speculation. The burden is upon the plaintiff to prove by a preponderance of the evidence any item or element of damages claimed and that it is properly attributable to the act of the defendant or defendants that you have found liable.

[32] Experts have testified in the case, and their opinions differ. In considering the weight to be given to the testimony of expert witnesses whose opinions differ, you may consider the ability and character of the witnesses, their actions upon the witness stand, the weight and process of the reasoning by which they support their opinion, their possible bias in favor of the side for which they testify, their relative opportunity for study or observation of the matters about which they testify, and any other matters which serve to illustrate their statements.

When you retire to consider your verdict, you will take with you the exhibits and the form of verdict which I have described to you. Insofar as those verdicts are concerned, if you find in favor of all of the defendants on both counts, you should say so and no more. If you find in favor of one or more defendants on one or more of the counts, you should say so and then you shall fix the

damages, which is a blank, in accordance with the instructions on damages.

A last word concerning your verdict: as you know if you have sat on juries before in order to return a verdict, it must be unanimous. Each of you must agree to it. Do not be concerned that each of you cannot remember everything that was said. That's why we have more than one juror. No one juror is expected to remember everything that was said. But some of you will remember parts of it and that will remind [33] others of other parts of it and collectively you can put together the important aspects of the case.

And it will have to be your collective recollection since it will not be permissible to begin reading back to you portions of the testimony.

It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement, that is, having as your aim the ultimate arriving at a verdict if you can do so without violence to your individual judgment. Each of you must decide the case for yourself. But do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is an erroneous opinion. But do not surrender your honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

Remember at all times you are not partisans, you are judges, judges of the facts. Your sole interest is to ascertain the truth from the evidence you have heard here in Court.

Counsel approach the Bench.

[34] (Whereupon, a conference was held at the Bench with Court and counsel, out of hearing of the jury, and reported as follows:

THE COURT: Any objection to the Court's charge from the plaintiff?

MR. KEENEY: Yes, Your Honor. We are objecting to the giving of Defendant's Charge 31. We think it misstates the statute that relates to Mr. Beddow. The statute specifically says, and it's in our written objection, that the transaction is not voidable under those three circumstances. The statute does not say that it's not a breach of fiduciary duty. The commentary to the statute specifically says that it does not address the breach of fiduciary duty, and those standards are specifically governed by common law, so we think it's clear error to give that instruction.

We would also note for the record we'd prefer that the remainder of our instruction had been given.

THE COURT: All right, the defendant?

MR. MURPHY: Your Honor, on behalf of the director defendants, we would specifically urge the Court to adopt our instruction No. 28, which would charge the jury that the director defendants were not required to obtain a second independent investment adviser. It's not required as a matter of law, and Mr. Hassett made quite an issue of it in his closing argument. I think for that reason the jury should be [35] charged on that, and then we would also ask the Court to have given the other instructions which we urged, which were not adopted by the Court, for the reasons we have already set forth.

MR. VIETH: As to plaintiff instruction No. 23, we have previously objected to plaintiff's instruction 23, which sets forth the claim of negligence of the defendant as to the proxy statement. We feel it would be error to so instruct. We have negligence, which is itself one element of Count I.

Indulge me one second.

Particularly, Your Honor, subparagraph 3 of that charge the particular paragraph 3 of that charge seems to us to have no bearing on whether the proxy statement was negligently prepared.

THE COURT: Anything else?

MR. VIETH: Thank you.

MR. SAYERS: On behalf of First American Bankshares and Virginia Bankshares, we object to giving of plaintiff's instruction No. 26 on the ground there is no evidence of control in this case to merit the giving of this instruction.

THE COURT: On the contrary, I think it's almost control as a matter of law. I disagree.

MR. SAYERS: Note our objection, Your Honor. Similarly, with respect to plaintiff's instruction No. 29, we [36] object to this because the Court has wrongly, we believe, decided the issue of law left open by footnote 7 of the Mills decision.

THE COURT: All right.

MR. SAYERS: We would rely upon the statement on page 13, 14 of the Gray Case (phonetic) that is cited by the plaintiff in other parts of the instructions for our authority as to that.

We also object to instruction No. 32 on the grounds that it doesn't inform the jury what the fiduciary duty of the majority stockholder is correctly. Fiduciary duty only exists if the majority stockholder controls and actively participates in the management of the company, and there is no evidence of that. We rely upon the Sweeney Case and the McDonald Case (phonetic). There is no fiduciary duty owed minority stockholders merely by owning a majority of stock, and for the same reasons we object to instruction No. 33, Your Honor.

THE COURT: Do defendants want to respond to the objection to defendants' instruction 31?

MR. MURPHY: Your Honor, what is charged is a conflict of interest here. There is no better—

THE COURT: It's Mr. Beddow we are talking about

MR. MURPHY: Yes.

MR. KEENEY: It appears after 47 of the plaintiff's, Your Honor.

[37] MR. MURPHY: It's a statutory yardstick which the Court and jury may use to determine whether or not there is a conflict of interest, in addition to the other in-

structions the Court has given. It's a yardstick which they can measure, which they can use to measure whether this man had actual conflict of interest.

MR. STUMP: It follows right after 690, Your Honor. 690 sets out the duty. Then you have the question of, well, suppose there is a conflict of interest. What is an impermissible conflict of interest? 691 answers that, so the two instructions as given correctly state Virginia law.

THE COURT: I will leave 31 as is.

What do you want to do about your alternates?

MR. KEENEY: We do not want to send them to the jury room.

THE COURT: All right.

Either side is entitled to object to those.

MR. CAWLEY: Did they object?

THE COURT: Yes. They will be excused.

All right, gentlemen. I will send them out.

MR. CAWLEY: Your Honor, for the record, we would like to object to those on behalf of First American Bankshares Incorporated and Virginia Bankshares Incorporated. I would like to object to the decisions of the Court to reject the defendants' instructions which were rejected and were [38] submitted by us.

MR. KEENEY: For the record, the plaintiff continues its objection to the use of defendants' proposed charge 31 and also objects for the record with respect to all charges that were rejected in its proposed instructions.

MR. STUMP: For clarity we object to giving of the plaintiff's instructions, and rejection of our own instructions.

(Whereupon, the conference at the Bench was concluded.)

* * * *

Selections from Trial Exhibits

PLAINTIFF'S EXHIBIT D

MEMORANDUM

TO: Jack W. Beddow

FROM: A. Vincent Scoffone

SUBJECT: Acquisition of FAB/VA Minority Interests

DATE: June 11, 1986

You have requested an analysis of the acquisition of the minority interests of First American Bank of Virginia as to cost, cash flow, etc. Attached to this memo is a schedule which details the appropriate information. The following analyzes the data contained in that schedule.

OWNERSHIP DATA

As of May 31, 1986, the Company owned 4,161,067 shares or approximately 84.98% of FAB/VA. The balance of shares (735,233) are owned by approximately 2,100 shareholders. Nearly 30,000 shares are held in the bank's own trust department for various trust accounts.

POTENTIAL PURCHASE PRICES

The schedule contains a range of potential purchase prices from a low of $32.00 (current market value—reflecting a 4% premium over book) to a high of $60.00 (reflecting a premium of 100% over book value).

The low price scenario will require funds in excess of $23.5 million while the high price scenario will require funds in excess of $44.3 million.

The recommended purchase price of $40.00 per share is highlighted in BOLD, and represents a premium of 30%

over book and 25% over current market. Total purchase price would be in excess of $29.4 million.

SOURCE OF FUNDS

It is assumed that the Company would use long-term borrowed funds as its source to purchase the minority interests at an average interest rate of 9.5%.

CASH FLOW EFFECT

Each purchase price scenario will cause an annual cash short-fall from a low of $324,000 to a high of $1,418,000. This short-fall is the result of net interest expense from borrowed funds exceeding the dividend derived from the purchased stock. The recommended purchase price of $40.00 will generate a cash deficit of $626,000.

NET INCOME EFFECT

The purchasing of the minority interests at FAB/VA will have a significant positive effect on the consolidated earnings depending upon the purchase price. The calculation of this effect is based upon the negative factors of net interest expense and goodwill amortization being offset by the positive factors of increased dividends and equity in undistributed earnings. The recommended purchase price of $40.00 will increase net income on an annualized basis by $1.8 million.

SUMMARY

It is my opinion that the acquisition of the minority shares of FAB/VA should be a top priority item for the Company. The Company does not now have the cash resources to consummate such an acquisition. The refinancing of the Company's current debt plus a capital infusion by the investors will solve this situation.

First American Bankshares, Inc.
Acquisition of FAB/VA
May 31, 1986

ASSUMPTION - 100% ACQUISITION

OWNERSHIP DATA			
Shares Outstanding	4,896,300		
Shares Owned By FABI	4,161,067	% of Ownership	84.98
Shares to be Acquired	735,233	% of Minority Ownership	15.02
Book Value Per Share	$30.70	1986 Earnings Per Share	$5.05

POTENTIAL PURCHASE PRICES	Current Market Price	1.3 X Book Value	1.5 X Book Value	2.0 X Book Value
Offering Price (Rounded)	$32.00	$40.00	$46.00	$61.00
Actual Book Multiple	1.042X	1.303X	1.498X	1.987X
Price/Earnings Ratio	6.34X	7.92X	9.11X	12.08X
$ of Core Deposits	8.1c	10.1c	11.6c	15.4c
Acquisition Cost	$23,527,000	$29,409,000	$33,821,000	$44,849,000

Source of Funds - Assumption - Borrowed Funds

CASH FLOW EFFECT (Annualized)				
Interest Expense at 9.5%	$(2,235,000)	$(2,794,000)	$(3,213,000)	$(4,261,000)
Tax Benefit from Interest at 46%	1,028,000	1,285,000	1,478,000	1,960,000
Increased Dividends at 1986 Budgeted Payout	883,000	883,000	883,000	883,000
Deficit Cash Flow	$ (324,000)	$ (626,000)	$ (852,000)	$(1,418,000)

NET INCOME EFFECT (Annualized)				
Interest Expense at 9.5%	$(2,235,000)	$(2,794,000)	$(3,213,000)	$(4,261,000)
Tax Benefit from Interest at 46%	1,028,000	1,285,000	1,478,000	1,960,000
Increased Dividends at 1986 Budgeted Payout	883,000	883,000	883,000	883,000
Increased Equity in Undistributed Earnings based on 1986 Budget	2,831,000	2,831,000	2,831,000	2,831,000
Goodwill Amortization on a 20 year basis	(48,000)	(342,000)	(562,000)	(1,114,000)
Increased Net Income	$ 2,459,000	$ 1,863,000	$ 1,417,000	$ 299,000

PLAINTIFF'S EXHIBIT F

KEEFE, BRUYETTE & WOODS, INC.
SPECIALISTS IN BANKING
Two World Trade Center 85th Floor
New York, N.Y. 10048

December 9, 1986

Mr. Jack W. Beddow
Executive Vice President & Secretary
First American Bankshares, Inc.
First American Bank Building
15th & H Streets, N.W.
Washington, D.C. 20005

Dear Jack:

This letter confirms the engagement of Keefe, Bruyette & Woods, Inc. ("KBW") by First American Bankshares, Inc. ("First American") to render financial advisory and investment banking services to First American in connection with the possible acquisition by First American of the minority interest in First American Bank of Virginia ("FABV") (the "Transaction"). As financial advisor to First American, KBW will advise and assist First American in arriving at definitive financial terms therefore.

In addition, if so requested by First American, KBW will render, in accordance with its customary practice, an opinion (the "Opinion") as to the fairness from a financial point of view of the consideration to be paid by First American to the minority stockholders of FABV in the Transaction. The Opinion shall be based upon such financial review of First American and FABV and their respective businesses and operations as KBW shall deem appropriate and feasible, limited in any event to an analysis of (i) publicly available information with respect to each such corporation, its outstanding securities and such

other matters as KBW deems appropriate and (ii) such other information as shall be supplied to KBW by each such corporation. The Opinion may be in such form as KBW shall determine and KBW may qualify the Opinion in such manner as KBW believes appropriate, including by stating therein that KBW has relied upon publicly available information or information furnished to it by First American and FABV. KBW has assumed the accuracy and completeness of such information and has not attempted independently to verify any of such information.

First American will (and will use its best efforts to cause FABV to) cooperate fully with KBW in connection with its financial review and analysis and the rendering of its Opinion, and will (and will use its best efforts to cause FABV to) provide KBW with such information concerning First American and FABV, respectively, as KBW deems necessary for its financial review and analysis and the rendering of its Opinion. All such information provided by FABV will be complete and accurate and not misleading, and First American will use its best efforts to ensure that all such information provided by FABV will be complete and accurate and not misleading.

First American agrees that the Opinion shall be used only by: (i) the Board of Directors and management of First American in considering the terms of the Transaction to which it relates, (ii) introduction into evidence and other references in connection with any litigation relating to the Transaction to which it relates, and (iii) reproduction in full in any Proxy Statement (a "Statement") in connection with the Transaction to which the Opinion relates. In the event of such reproduction of the Opinion in a Statement, the Company may also include references to the Opinion, to KBW and to its relationships with First American and FABV (in each case in such form as KBW shall approve) in the Statement.

In addition, First American acknowledges that all opinions and advice (written or oral) given by KBW to First

American are intended solely for the benefit and use of First American (including its management, directors and attorneys). Other than as contemplated by the previous paragraph, neither the Opinion nor any other opinion or advice (written or oral) of KBW shall be used, reproduced, disseminated, quoted or referred to at any time, in any manner, or for any purpose, nor shall any public references to KBW be made by First American (or such persons), without the prior written consent of KBW, which consent shall not be unreasonably withheld.

For the services described above, First American agrees to pay KBW a cash fee of $25,000 upon the signing of this agreement. In addition, First American agrees to pay KBW a cash fee equal to $75,000 at the consummation of the Transaction.

In addition to any fees payable to KBW pursuant to the foregoing, and regardless of whether the Transaction is consummated, First American agrees, from time to time upon request, to reimburse KBW for all reasonable out-of-pocket expenses and disbursements, including fees and expenses of counsel, incurred in connection with this retention.

In connection with KBW's engagement (which engagement may have commenced prior to the date hereof) to advise and assist First American, First American agrees to indemnify and hold harmless KBW and its affiliates, the respective directors, officers, agents and employees of KBW and its affiliates and each other person, if any, controlling KBW or any of its affiliates, to the full extent lawful, from and against any losses, claims, damages or liabilities (or actions, including shareholder actions, in respect thereof) related to or arising out of such engagement or KBW's role in connection therewith, and will reimburse KBW and any other party entitled to be indemnified hereunder for all expenses (including counsel fees) as they are incurred by KBW or any such other indemnified party in connection with investigating, preparing or defending any such action or claim, whether or not in connection with pending or threatened litigation in which KBW is a party. First American will not, however, be responsible for any claims, liabilities, losses, damages or expenses which are finally judicially determined to have resulted primarily from KBW's bad faith or negligence. First American also agrees that neither KBW, nor any of its affiliates, nor any officer, director, employee or agent of KBW or any of its affiliates, nor any person controlling KBW or any of its affiliates, shall have any liability to First American for or in connection with such engagement except for any such liability for losses, claims, damages, liabilities or expenses incurred by First American that is finally judicially determined to have resulted primarily from KBW's bad faith or negligence. The foregoing agreement shall be in addition to any rights that KBW or any indemnified party may have at common law or otherwise, including, but not limited to, any right to contributi For the sole purpose of enforcing and otherwise giving effect to the provisions of this agreement, First American hereby consents to personal jurisdiction and service and venue in any court in which any claim which is subject to this agreement is brought against KBW or any other indemnified party.

It is understood that KBW's engagement referred to above may be embodied in one or more separate written agreements and that, in connection with such engagement, KBW may also be requested to provide additional services or to act for First American in one or more additional capacities. This indemnification shall apply to said engagement, any such additional services or activities and any modification of said engagement, and shall remain in full force and effect following the completion or termination of KBW's engagement.

KBW's engagement hereunder may be terminated by either First American or KBW at any time, with or without cause, upon written advice to that effect to the other

party; provided, however, that KBW will be entitled to its full fee as stated above in the event that at any time prior to the expiration of two years after such termination the Transaction is consummated and provided further, that the expenses and indemnity and contribution provisions hereof shall survive such termination.

Please confirm that the foregoing is in accordance with your understanding and agreement with KBW by signing and returning to KBW the duplicate of this letter enclosed herewith.

Sincerely,

KEEFE, BRUYETTE & WOODS, INC.

By: /s/ Michael C. Connor
MICHAEL C. CONNOR
Senior Vice President

MCC/dr

The undersigned hereby agrees to the above terms as of this 30 day of Dec., 1986.

FIRST AMERICAN BANKSHARES, INC.

By: /s/ Jack W. Beddow
JACK W. BEDDOW
Executive Vice President & Secretary

PLAINTIFF'S EXHIBIT J

CONFIDENTIAL

MEMORANDUM

TO: Robert G. Stevens
Jack W. Beddow

FROM: A. Vincent Scoffone

SUBJECT: Acquisition of FAB/VA Minority Interests

DATE: January 7, 1987

You have requested an analysis of the acquisition of the minority interests of First American Bank of Virginia as to cost, cash flow etc. Attached to this memo are schedules which detail the appropriate information. The following summarizes the data contained in those schedules.

OWNERSHIP DATA

As of December 31, 1986, the Company owned 4,161,067 shares or approximately 85.00% of FAB/VA

POTENTIAL PURCHASE PRICES

The schedules contain a range of potential purchase prices from current market price to 1.5 times current book value.

The recommended purchase prices are highlighted in BOLD, and represent a premium of 30% over book and 31% over current market for FAB/VA.

SOURCE OF FUNDS

It is assumed that the Company would use the funds generated from the new long-term debt at an interest

rate of 9.14% as its source to purchase the minority interests at an average interest rate of 9.14%.

CASH FLOW EFFECT

Each purchase price scenario will cause an annual cash short-fall of $1,333,000 (FAB/VA). This short-fall is the result of net interest expense from borrowed funds exceeding the dividend derived from the purchased stock. The recommended purchase price scenarios will generate a total cash deficit of

NET INCOME EFFECT

The purchasing of the minority interests will have a significant positive effect on the consolidated earnings depending upon the purchase price. The calculation of this effect is based upon the negative factors of net interest expense and goodwill amortization being offset by the positive factors of increased dividends and equity in undistributed earnings. The recommended purchase price scenarios will increase net income on an annualized basis by nearly

First American Bankshares, Inc.
Acquisition of FAB/VA
December 31, 1986

ASSUMPTION - 100% ACQUISITION

OWNERSHIP DATA

Shares Outstanding	4,896,287		
Shares Owned By FABI	4,162,052	% of Ownership	85.00
Shares to be Acquired	734,235	% of Minority Ownership	15.00
Book Value Per Share	$33.30	1986 Earnings Per Share	$5.06

POTENTIAL PURCHASE PRICES

	Current Market Price	1.3 X Book Value	1.4 X Book Value	1.5 X Book Value
Offering Price (Rounded)	$33.00	$43.25	$46.75	$50.00
Actual Book Multiple	0.991X	1.299X	1.404X	1.502X
Price/Earnings Ratio	6.52X	8.55X	9.24X	9.88X
$ of Core Deposits	7.6c	10.0c	10.8c	11.6c
Acquisition Cost	$24,230,000	$31,756,000	$34,325,000	$36,712,000
Source of Funds - Assumption - Borrowed Funds				

CASH FLOW EFFECT (Annualized)

Interest Expense at 9.14%	$(2,215,000)	$(2,902,000)	$(3,137,000)	$(3,355,000)
Tax Benefit from Interest at 34%	753,000	987,000	1,067,000	1,141,000
Increased Dividends at $1.20 Per Share	881,000	881,000	881,000	881,000
Deficit Cash Flow	$ (581,000)	$(1,034,000)	$(1,189,000)	$(1,333,000)

NET INCOME EFFECT (Annualized)

Interest Expense at 9.14%	$(2,215,000)	$(2,902,000)	$(3,137,000)	$(3,355,000)
Tax Benefit from Interest at 34%	753,000	987,000	1,067,000	1,141,000
Increased Dividends at $1.20 Per Share	881,000	881,000	881,000	881,000
Increased Equity in Undistributed Earnings at $3.86 Per Share	2,834,000	2,834,000	2,834,000	2,834,000
Goodwill Amortization over a 20-year period	11,000	(365,000)	(494,000)	(613,000)
Increased Net Income	$ 1,264,000	$ 1,435,000	$ 1,151,000	$ 888,000

CONFIDENTIAL

PLAINTIFF'S EXHIBIT K

Handwritten Notes of A. Vincent Scoffone

1978 Barry Clark 12-31-85

√ 1. Dissenters Rights (No dissenters right)

√ 2. Building Projections (Effect on Earnings)

√ 3. Litigation (No material)

4 Conv Deposit - Amortization ✓

√ 5 Pension Plan - (Overfunded)

6 Purchases of Fund. since 1984
" " Fa. since 1984

7. Asset Values - Real Estate - Securities
FDIC Loss Agreement

Steps
1 KBW + FTOOS + C&W Equity
2 CMC & MLD Equity - Narrow gap of $42 / Up to $45
3 FTOOS inform FAB/VA Board
4 FAB/VA establish Committee

FAB/VA Acquisition

Strategy KBW $42 1.26X

1 Letter from KBW 1-12-87

2 Documentation 1-16-87

3 Board Meeting 11AM 1-13-87

4 Board to form Committee 1-16-87

5. Board by Board 2-12-87

3 4
4 5
5 4 6

PLAINTIFF'S EXHIBIT L

January 29, 1987

REDACTED
From Minute Book
(Executive Committee)
Page 280

After a lengthy presentation and discussion in Executive Session, the Committee took the following action. Motion was duly made and unanimously approved to recommend to the Board of Directors at their meeting on February 12, 1987 to accept the Holding Company's tender offer of $42 per share.

There being no further business presented, the meeting was adjourned at 11:15 a.m.

/s/ E. Guy Ridgely
E. GUY RIDGELY, Chairman

/s/ Gwen J. King,
GWEN J. KING, Secretary to the Board

PLAINTIFF'S EXHIBIT M

Handwritten Notes of J. Orfe of 1/29/87
Executive Committee Meeting

1/29/87 Exec. Session

C proposal - to BOD -
re: recommend'n. -

Beldon -
Qs - C der. -
what cons'd
bk stk special wtf - Ny
SR VP - Mike Connor
- John Boyle
info f/ firm. - / Corp. finky
M/A:
has reprec. answers.
Riggs (hostile T-O)
Central Fidel.
1st Va. -
1st Md. -
Price - $42
reasonable?

85% SH - buy out

Classic control sale

focus on FABV

Peer grp - a critical element - re: $/stk
- FABV - @ 31-32 / '85-'86
- bk. values were materially less
- repres. stks. - this market.

- peak 7/86
drop 9/86.

- bk. stks. strong -

- re: prices for FABV - parent set the price
~ an open mkt -
15% held / little trading

- Q - what effect on mkt. value?

- Q - re: comparisons - diff'e mkt.

E.C.
1-29-87

FABV - assumptions
fl/ margin of inc + projections/forecasts as reported.

little trad
illiquid stk
mngt's owner - only 1 off'l bid
unwillingness to compete
~ mngt; reality
- a realistic price - est'd. / ~ range
- his co. wld ~ buy
- h.c. - if bk sold - wld be h.
- central issue -

- mkt. has ~ been made i the FABV stk.
- his co. won't do that -
- accts for 2% owning - P/E ratio, etc. -

Q - fairness to small SH? squeeze out? -

Q - forced sale if 1/2 price re. value - fair.

4/1/87

How to keep PR afloat?
" prevent adverse reac.
perception

reas. ent. - based on mkt / past 3 years

this is not a control sale
h.c. already have control —

Qs - @ sometime prems. (i.e. ≈ controls.

stk. rtg. offer - 3/86-

169K offer
154K bought by h.c.
44% ~ subscribed for by SH
Surprised that so lo. —

→ p'pal determ re: what to pay for stk.
today are minor SH

→ satisfied - price level in mkt -
consistent w/ mkt

- takes into acct - minor int.
~ liq'd.
- hi prem (30%) rel. to other transacs
in US bk stk mkt
(big/small)
few deals in last few mos. -
bec prems.

selected peer grp ratios
FABV stocks rtg will -

"reas."
Reprod. persist

Consid - factors:

- market
- earnings
- real estate Values (mortgages pay.) 30-40 mln
- Pens. in fund (? assets than oblig.)

} non balance sheet items

OFFSETS
70 bankrupts (in NY for loss Losses (est. is 125)
8-10 mln/yr over time
8 mil. (good will)

- heart tried to reas. new bldg.
- ~ penalty (est. for good grief

1-29-87

42 a necessity for fair value
based on earn + earn impact. —

worked for a p.c. 2 yrs
28/32 (60% ~ accepts

hasn't done a lot of deals like this. —

very unusual
few bks. w/ minor SH —

was real est. overvalued properly —
values came f/ L.C. —

Q - value to co. ? 100% -85-

special ntg.

recom. + 42 price
mod. reb. — by L.C. — to provide note to
minor SH.

notify other dirs. —

PLAINTIFF'S EXHIBIT O

February 12, 1987

The regular meeting of the Board of Directors of the First American Bank Virginia was held this Thursday, February 12, 1987, and convened at 9:00 a.m. with the following directors present:

Milton L. Drewer, Jr., Chairman	Charles T. Lindsay, Jr.
Emanuel A. Baker, Jr.	Donald R. Maxfield
Jack W. Beddow	Linda H. Michael
Harriet F. Bradley	Milton V. Peterson
Joel T. Broyhill	Glenn W. Saunders, Jr.
Thomas B. Chamberlin	Charles H. Smith, Jr.
Thomas P. Chisman	Verlin W. Smith
Sidney O. Dewberry	Henry A. Thomas
George W. Johnson	

Upon recommendation of the Executive Committee and motion duly made and seconded the following Resolution was approved:

RESOLVED, that the Agreement and Plan of Merger in the form presented to this meeting between Virginia Bankshares, Inc., FAB Acquisition Bank and First American Bank of Virginia, a copy of which is ordered to be filed with the minutes of this meeting, providing for the merger (the "Merger") of FAB Acquisition Bank into First American Bank and pursuant to which holders of shares of First American Bank common stock, other than Virginia Bankshares, will receive $42 cash per share is hereby approved and found to be in the best interests of the Bank; and

RESOLVED, that the Agreement and Plan of Merger is hereby approved and found to be in the best interests of First American Bank's shareholders and directed to be submitted for consideration by First American Bank's shareholders with the recommendation of the Board of Directors that it be approved by them; and

RESOLVED, that the Chairman of the Board or the President of the Bank are hereby authorized to execute and deliver the Agreement and Plan of Merger on behalf of the Bank; and

RESOLVED, that the officers named in the foregoing resolution are hereby authorized to agree to such changes in the Agreement and Plan of Merger as they, upon the advice of counsel, may deem necessary or desirable to carry out the objectives of the Agreement and Plan of Merger; and

RESOLVED, that the Chairman of the Board, President, any Executive Vice President or any Vice President of First American Bank is hereby authorized and directed to take or cause to be taken all actions and to do all things required under the Agreement and Plan of Merger or by the laws of Virginia or the United States in order to consummate the Merger provided for therein and the other transactions contemplated by the Agreement and Plan of Merger, or which may be necessary or appropriate for such purpose, including but not limited to preparation and filing of applications to the State Corporation Commission of Virginia, the Federal Deposit Insurance Corporation and other regulatory agencies seeking approval of the Merger; and

RESOLVED, that the annual meeting of the shareholders of the Bank, at which directors will be elected and the Agreement and Plan of Merger will be considered, is hereby called to be held on April 28, 1987 at the main office of the Bank at 2:00 p.m.; and

RESOLVED, that if delays in clearing the Bank's proxy soliciting material with appropriate regulatory agencies should make it impossible to hold the

annual meeting on this date, the Chairman of the Board or the President of the Bank is authorized to change the time of meeting and the mailing date of the proxy material so that the annual meeting can be held at a convenient date as soon as possible after such date; and

RESOLVED, that the preliminary proxy soliciting material, as such material relates to the Agreement and Plan of Merger, submitted to this meeting is hereby approved with the officers named in the foregoing resolutions being authorized to agree to such changes, amendments and additions as they, upon the advise of counsel, may deem necessary or desirable to have such material comply with applicable rules and regulations of state and federal regulatory agencies; and

RESOLVED, that any action of the kinds described in the resolutions next preceding taken by officers of First American Bank prior to the meeting at which these resolutions are adopted is hereby ratified and confirmed in all respects.

Upon motion duly made and seconded, the Board established April 28, 1987 for the Annual Meeting with mailing of proxies set for April 3 and record date to close books for voting purposes at the annual meeting as of the close of business March 13, 1987.

AGREEMENT AND PLAN OF MERGER OF FAB ACQUISITION BANK INTO FIRST AMERICAN BANK OF VIRGINIA

Agreement and Plan of Merger dated as of February 12, 1987, by and among Virginia Bankshares, Inc., a Virginia bank holding company ("Virginia Bankshares"), FAB Acquisition Bank, a Virginia banking corporation ("FAB"), and First American Bank of Virginia, a Virginia banking corporation ("First American"), FAB and First American being herein sometimes together called the "Constituent Corporations."

WHEREAS, FAB is a corporation duly organized and existing under the laws of the Commonwealth of Virginia, having 100,000 shares of authorized Common Stock ("FAB Common Stock"), of which, on the date of this Agreement and Plan of Merger, 100,000 shares were issued and outstanding and were owned by Virginia Bankshares; and

WHEREAS, First American is a corporation duly organized and existing under the laws of the State of Virginia, having 10,000,000 shares of authorized Common Stock ("First American Common Stock") of which, on the date of this Agreement and Plan of Merger, 4,896,287 shares were issued and outstanding; and

WHEREAS, the board of directors of the Constituent Corporations deem it advisable that such corporations merge;

NOW, THEREFORE, in consideration of the premises and of the mutual agreements and covenants herein contained, it is planned, subject to satisfaction of the terms and conditions hereof, that FAB shall be merged into First American, that First American, a Virginia corporation, shall be the resulting bank (the "Resulting Bank"), and that the terms and conditions of such

merger (the "Merger"), the plan and mode of carrying the same into effect, and the manner and basis of converting the shares of the Constituent Corporations, shall be as hereinafter set forth:

1. *Terms, Conditions and Effective Date of Merger*

1.1 Following adoption of this Agreement and Plan of Merger by the boards of directors of the respective Constituent Corporations and its approval by shareholders of the respective Constituent Corporations as provided by law, the parties hereto shall, except as hereinafter provided, cause Articles of Merger, duly prepared and executed in accordance with the Virginia Stock Corporation Act, to be filed with the State Corporation Commission of Virginia. The separate existence of FAB shall cease as of the close of business on the Effective Date (as hereinafter defined) and FAB shall thereupon be merged into First American.

1.2 The Effective Date shall be the date when, after Articles of Merger shall have been accepted for recording, the State Corporation Commission of Virginia shall issue a Certificate of Merger.

2. *Conversion and Cancellation of Shares*

2.1 The manner and basis of converting, cancelling, or exchanging shares of capital stock of the Constituent Corporations on the Effective Date shall be as follows:

(a) Each share of FAB Common Stock issued and outstanding on the Effective Date shall be cancelled and no new shares or other securities, obligations or cash will be issuable with respect thereto.

(b) Each share of First American Common Stock issued and outstanding on the Effective Date, other than shares of First American Common Stock owned by Virginia Bankshares, shall be converted into the right to receive $42 in cash from Virginia Bankshares.

(c) Each share of First American Common Stock owned by Virginia Bankshares shall be converted into one share of common stock of the Resulting Bank.

(d) As soon as practicable after the Effective Date, First American as Exchange Agent will send a notice and transmittal form to each holder, other than Virginia Bankshares, of a certificate that represented shares of First American Common Stock immediately prior to the Merger, advising such holder of the terms of the exchange effected by the Merger and the procedure for surrendering to the Exchange Agent such certificate for exchange into cash.

(e) Each holder of shares of First American Common Stock other than Virginia Bankshares who shall have delivered his certificate representing such shares to First American as Exchange Agent shall receive a check in the appropriate amount (without interest) from the Exchange Agent.

3. *Articles of Incorporation, By-laws and Directors of the Resulting Bank*

3.1 On the Effective Date, there shall be no change in the Articles of Incorporation (except any change caused by the filing of Articles of Merger relating to the Merger), By-laws or Board of Directors of the Resulting Bank.

4. *Conditions to the Merger*

4.1 Consummation of the Merger is subject to satisfaction of the following conditions:

(a) The approving vote of the holders of more than two-thirds of the outstanding shares of First American Common Stock at a meeting called and held as provided by Virginia law.

(b) The approving vote of the holder of the outstanding shares of FAB Common Stock in accordance with Virginia law.

(c) The approval of the Merger by the State Corporation Commission of Virginia and the Federal Deposit Insurance Corporation.

5. *Effect of the Merger*

5.1 The Merger, upon the Effective Date, shall have the effect provided for by Section 13.1-721 of the Code of Virginia.

6. *Termination*

6.1 This Agreement and Plan of Merger shall automatically terminate if the Merger has not become effective by September 30, 1987.

WITNESS the following signatures as of the date first above written.

VIRGINIA BANKSHARES, INC.

By _____
President

FAB ACQUISITION BANK

By _____
President

FIRST AMERICAN BANK OF VIRGINIA

By _____
Chairman of the Board

_____ _____

_____ _____

_____ _____

_____ _____

_____ _____

_____ _____

_____ _____

_____ _____

_____ _____

_____ _____

_____ _____

A majority of the directors of First American Bank of Virginia

PLAINTIFF'S EXHIBIT O-2

January 29, 1987

The regular meeting of the Executive Committee of the Board of Directors of the First American Bank of Virginia was held this Thursday, January 29, 1987 convening at 9:15 a.m. with the following directors present:

Permanent Members	*Rotating Directors*
E. Guy Ridgely, Chairman	Joel T. Broyhill
Jack W. Beddow	George W. Johnson
Milton L. Drewer, Jr.	Charles T. Lindsay, Jr.
Eric W. Erdossy	Donald R. Maxfield
Charles H. Smith, Jr.	
Stephen G. Yeonas	

After a lengthy presentation and discussion in Executive Session, the Committee took the following action. Motion was duly made and unanimously approved to recommend to the Board of Directors at their meeting on February 12, 1987 to accept the Holding Company's tender offer of $42 per share.

PLAINTIFF'S EXHIBIT S

Draft Proxy Statement

DRAFT 7/11/86 Introduction EWE45

FIRST AMERICAN BANK OF VIRGINIA

PROXY STATEMENT

INTRODUCTION

This Proxy Statement is being furnished to shareholders of First American Bank of Virginia ("First American") in connection with the solicitation of proxies by the Board of Directors of First American for use at the ~~Special~~ Annual Meeting of Stockholders, and at any adjournments thereof, to be held on April 28, 1987.

At the ~~Special~~ Annual Meeting, shareholders will be asked to approve a Plan of merger dated ~~as of~~ February 12, 1987 between First American and FAB Bank, a wholly-owned subsidiary of Virginia Bankshares, Inc., providing for the merger of FAB Bank into First American and the conversion of each share of First American Common Stock, other than shares held by Virginia Bankshares, into the right to receive $ 42 in cash.

(FAB Acquisition Bank throughout)

The Resulting Bank will be First American which will operate under First American's Articles of Incorporation under the name "First American Bank of Virginia." A copy of the Plan of Merger is attached to this Proxy Statement as Appendix I.

The Board of Directors is not aware of any additional matters that will be presented for action at the Special Meeting. As to other matters, if any, that may properly come before any of the meeting, the enclosed form of proxy authorizes the persons named therein to act in accordance with their best judgment.

The Board of Directors by unanimous vote has approved the Plan of Merger. The Board of Directors recommends that shareholders vote FOR approval of the Plan of Merger. Since Virginia Bankshares owns 85 % of First American Common Stock, and has indicated its intention of voting for the Plan of Merger, First American expects the Plan of Merger to be approved and adopted as Virginia law requires the affirmative vote of more than two-thirds (66 2/3%) of votes entitled to be cast by the holders of First American Common Stock to approve a merger.

First American will bear the cost of solicitation of proxies by the Board of Directors. In addition to use of the mails, officers and regular employees of First American may solicit proxies personally or by telephone. [Brokerage houses, nominees, fiduciaries and other custodians have been requested to forward soliciting materials to beneficial owners and will be reimbursed for expenses incurred in sending proxy materials to beneficial owners.]

This Proxy Statement, the notice of the special meeting and the enclosed form of proxy are first being mailed to shareholders on or about April 21, ~~1986~~ 1987

First American's executive offices are located at 1970 Chain Bridge Road, McLean, Virginia, 22102, and its telephone number is 703/821-7777.

SUMMARY

The following is a summary of certain information contained elsewhere in this Proxy Statement. For a more complete statement, reference is made to, and this summary is qualified in its entirety by, the more detailed information contained in the Proxy Statement, the appendixes hereto and the documents referred to herein.

First American Bank of Virginia and Virginia Bankshares, Inc.

First American is a commercial bank chartered in Virginia with [redacted] full service banking offices [redacted] located throughout the Commonwealth [redacted]. At ~~June 30~~, 1986, First American reported total assets of $[redacted]. See "Information as to First American Bank."

Virginia Bankshares, Inc. is a registered bank holding company and a wholly-owned subsidiary of First American Bankshares, Inc., also a registered bank holding company. Virginia Bankshares owns 85 % of the issued and outstanding First American Common Stock. See "Special Meeting -- Principal Holder of Voting Securities."

Special Meeting

The Special Meeting of Shareholders of First American will be held on _____, 1986, at 11 a.m., local time, at the main office of the Bank located at 1970 Chain Bridge Road, McLean, Virginia. Only shareholders of record at the close of business on _____, 1986 will be entitled to vote at the Special Meeting, and each share of First American Common Stock is entitled to one vote at the Special Meeting.

Purpose of the Special Meeting

At the Special Meeting, First American shareholders will be asked to approve the Plan of Merger which provides for the merger of FAB Bank, a wholly-owned subsidiary of Virginia Bankshares, with and into First American under First American's Restated Articles of Incorporation. The Plan of Merger provides for a cash payment to First American's shareholders, other than Virginia Bankshares, of $42 for each share of First American Common Stock that they hold. See "The Proposed Merger."

Shareholder Approval

Pursuant to the Virginia Stock Corporation Act, the affirmative vote of the holders of more than two-thirds (66 2/3%) of the votes entitled to be cast by the First American Common Stock will be required to approve the Plan of Merger. Virginia Bankshares, as holder of all of the outstanding shares of FAB Bank, has approved the Plan of Merger. Because Virginia Bankshares, which owns 95% of issued and outstanding First American Common Stock, has indicated its intention of voting its shares for approval of the Plan of Merger, the Board of Directors of First American expects the Plan of Merger to be approved. See "The Special Meeting -- Principal Holder of Voting Securities."

Recommendation of the Board of Directors

The Board of Directors of First American has approved the Plan of Merger and believes that the terms of the merger are fair to its shareholders and that the proposed merger is in the best interest of shareholders of First American. Accordingly, the Board recommends that shareholders vote FOR the proposed merger.

The Board of Directors believes that the proposed merger will enable the Resulting Bank to compete more effectively, provide the opportunity to realize certain economies, and result in an institution better able to respond to technological change. The Board believes that the price to be paid to shareholders other than Virginia Bankshares is fair. The Board of Directors is aware that the trend in recent years in formation of bank holding companies is for subsidiary banks to be wholly-owned subsidiaries rather than having an outstanding minority interest. SEE "The Proposed Merger -- Background of the Merger."

Opinion of Investment Banker

First American's Board of Directors commissioned _____, an independent investment banking firm, to pass on the fairness of the merger from a financial point of view. This opinion, which is included in the Proxy Statement, should be read in its entirety. SEE "The Proposed Merger -- Opinion of Investment Bankers."

Management of the Resulting Bank

After the Effective Date of the Merger, the Board of Directors of the Resulting Bank will comprise the members of the Board of Directors of First American immediately preceding the Effective Date of the Merger. Similarly, the principal executive officers of First American prior to the merger will comprise the principal officers of First American immediately after the Effective Date of the Merger. SEE "Management of Resulting Bank."

Dissenter's Rights

Under the Virginia Banking Act, holders of First American Common Stock will not be entitled to statutory dissenter's rights with respect to the merger. SEE "Rights of Dissenting Shareholders."

Federal Income Tax Consequences

Generally, if the merger is consummated, each shareholder other than Virginia Bankshares will recognize taxable gain or loss for federal income tax purposes equal to the difference, if any, between the amount of cash received pursuant to the merger and the cost or other tax basis of the shareholder's First American Common Stock. Each shareholder should consult his tax adviser as to the particular consequences of the merger to him, including the application of state, local and foreign tax laws. SEE "The Merger -- Federal Income Tax Consequences."

Recent Market Prices, Dividends

First American Common Stock is traded in the over-the-counter market. The following table sets forth for the periods indicated the prices per share and the amount of cash dividends per share by quarters for 1984, 1985, and 1986 ~~as above~~ and MRQ to date

Quarter Ended	1986 Sales* High	1986 Sales* Low	Dividends per Share
March 31	$	$	
June 30			
September 30 (Through ___)			

Quarter Ended	1985 Bid/Sales* High	1985 Bid/Sales* Low	1985 Asked High	1985 Asked Low	
March 31	$	$	$	$	
June 30					
September 30					
December 31					

Quarter Ended	1984 Bid High	1984 Bid Low	1984 Asked High	1984 Asked Low	
March 31	$	$	$	$	
June 30					
September 30					
December 31					

* NASDAQ revised its method of reporting stock prices on April 1, 1985 to report only high and low sales prices.

Selected Financial Data

The following table sets forth certain historical consolidated financial information for First American Bank of Virginia. This information is based on the financial statements of First American included in this Proxy Statement and should be read in conjunction therewith. The data has been adjusted for stock splits and stock dividends during the indicated period.

THE SPECIAL MEETING

Date, Place and Time of Meeting.

The Special Meeting of First American will be held on _____, 1986 at 11:00 a.m. local time, at First American's main office, 1970 Chain Bridge Road, McLean, Virginia.

Record Date; Voting Rights

On _____, 1986, the record date for the Special Meeting, First American had outstanding _____ shares of Common Stock which was the only class of securities authorized and outstanding. Only shareholders of record at the close of business on the record date are entitled to notice of and to vote at the Special Meeting or any adjournment thereof. Each share is entitled to one vote on the Plan of Merger. The Plan of Merger will be approved if more than two-thirds of all shares are voted in favor of the Plan of Merger.

Principal Holder of Common Stock

To the knowledge of First American, no shareholder owns of record or beneficially as of the record date and since the beginning of First American's last fiscal year, more than 5% of its outstanding stock except as set forth in the following table.

Name and Address of Beneficial Owner	Amount and Nature of Beneficial Ownership	Percent of Class
Virginia Bankshares, Inc. 1701 Pennsylvania Avenue N.W. Washington, D. C. 20006		

Virginia Bankshares is a registered bank holding company and a wholly-owned subsidiary of First American Bankshares, Inc., also a registered bank holding company. Virginia Bankshares has indicated to First American's Board of Directors that it intends to vote all of its shares of First American Common Stock for approval of the Plan of Merger and thus the Board of Directors expects the Plan of Merger to be approved since Virginia Bankshares owns more than the number of shares required to approve the Plan of Merger.

Voting and Proxy Revocation Rights

Any shareholder given a proxy has the right to revoke it at any time before its exercise by delivering a notice in writing of such revocation or a duly executed proxy bearing a later date to ~~the Secretary of First American, Warren T. Brehm, at the main office~~, 1970 Chain Bridge Road, McLean, Virginia 22102. In addition, a shareholder may revoke a proxy by attending the ~~Special~~ Annual Meeting and notifying the chairman of the meeting of his election to vote his shares in person. Attendance at the ~~Special~~ Meeting without notification to the chairman will not constitute revocation of the proxy.

Shares represented at the meeting by proxies given to the Board of Directors will be voted in the manner specified by the shareholders. If the proxy is marked neither for nor against the Plan of Merger, shares represented by the proxy will be voted in favor of the Plan of Merger.

Rights of Dissenting Shareholders

Under the provisions of the Virginia Banking Act, shareholders of a Virginia banking corporation are not granted the right to object to a merger and demand payment for their shares, and thus holders of First American Common Stock do not have statutory dissenter's rights.

THE PROPOSED MERGER

General

This section of the Proxy Statement describes the more important aspects of the proposed merger but is not complete and is qualified by reference to the Plan of Merger which is set forth as Appendix I. All shareholders are urged to read the Plan of Merger.

Before it becomes effective, the Plan of Merger must be approved by the vote of more than two-thirds of the outstanding voting stock of First American. Since Virginia Bankshares owns more than the requisite minimum and has indicated its intention of voting for the Plan of Merger, the Board of Directors of First American expects the Plan of Merger to be approved. In addition to shareholder approval, the Federal Deposit Insurance Corporation ("FDIC") and the State Corporation Commission of Virginia (the "Corporation Commission") must approve the merger. Before acting on the application for approval of the merger, the FDIC is required to request reports of the competitive factors involved from the Department of Justice, the Comptroller of the

Currency and the Board of Governors of the Federal Reserve System. After approval of the merger, the Department of Justice is notified and the transaction cannot be consummated for a period of 30 days after approval in order to afford the Department of Justice an opportunity to take such action under the antitrust laws as it deems necessary or desirable in the public interest, including seeking to enjoin the consummation of the transaction. Since Virginia Bankshares already is in a position to control First American, the Board of Directors does not believe that the proposed merger will stimulate any challenge on antitrust grounds.

It is anticipated that the effective date of the merger will be on or about ?, 1987.

Background of the Merger

The proposed merger represents a continuation of the efforts of First American Bankshares to consolidate its banking operations in wholly-owned subsidiaries. In 1983, the merger of five banks, a majority of stock ownership of all of which was owned by First American Bankshares, into First American was approved by the constituent banks' shareholders and made effective on _____. However, because First American at that time was not a wholly-owned subsidiary of Virginia Bankshares, the transaction resulted in First American continuing to have a minority interest of approximately 15% of its outstanding shares held by approximately _____ shareholders of record.

In 1986, the management of First American Bankshares proposed the merger to the Board of Directors of First American. The principal purpose of the merger was to achieve organizational efficiencies resulting from First American becoming a wholly-owned subsidiary of Virginia Bankshares. Further, the merger will eliminate the potential for conflicts of interest between minority shareholders of First American and Virginia Bankshares and its affiliates.

Recommendation of the Board; Reasons for the Merger

The Board of Directors unanimously recommends that shareholders vote in favor of approval of the Plan of Merger. The Board's recommendation and conclusion that the merger is in the best interest of First American's shareholders are based upon ~~their~~ evaluation of a number of factors, including those set forth below.

The Plan of Merger has been approved by the Board of Directors because it provides an opportunity for First American's public shareholders to achieve a high value for their shares. The price to be paid is about _____% higher than the $_____ per share at which First American Common Stock traded on _____, 1987, the last trading day prior to announcement of the proposal. In evaluating the fairness of the merger to the public holders of First American Common Stock, the Board was aware that the net book value per share at ~~June 30~~, 1986 of the Common Stock was $_____ per share and at December 31, 1985 was $_____ per share and that the $_____ per share which will be paid to public holders of First American Common Stock

represents a premium of approximately _____% and __% respectively, over the book value of First American Common Stock at such dates.

The Board of Directors was aware that First American Bank earned $_____ in the year ended December 31, 1985, compared to $_____ for the 1984 fiscal year, and ~~for the six months ended June 30, 1986 earned $_____ (unaudited)~~ compared with earnings of $_____ (unaudited) for the comparable period of 1985.

Opinion of Financial Adviser

_____ has delivered its written opinion to the Board of Directors that the $_____ per share cash to be paid to the public holders of First American Common Stock is fair to the holders of such shares. _____ did not participate in the negotiations in which the price per share to be paid was agreed upon. The opinion of _____, which is reproduced below, relies upon the accuracy and completeness of the financial and other information provided by First American, and on publicly available information concerning First American. _____ did not attempt independently to verify such information or to make or cause to be made any independent evaluation of any assets of First American.

_____ is a regional investment banking firm headquartered in _____. As part of its investment banking business, it is continually engaged in the evaluation of businesses and their securities in connection with mergers and

distributions of listed and unlisted securities, private placements of securities, and evaluations for its estate, corporate and other purposes.

For rendering its opinion, _____ will be paid (TO COMP).

[Opinion of Financial Adviser]

Effects of the Merger

If the merger is consummated, holders of First American Common Stock other than Virginia Bankshares will no longer have an equity interest in First American and will not share in its future earnings and growth to the extent there are earnings and growth. Instead, such holders will have the right to receive $ 42 cash for each share of First American Common Stock held by them.

As a result of the merger, First American would become a wholly-owned subsidiary of Virginia Bankshares. First American Common Stock would no longer be traded in the over-the-counter market and the registration of First American Common Stock under the Securities Exchange Act of 1934 (the "1934 Act") would terminate. As a consequence, First American no longer would file reports with the FDIC and would be relieved of the obligation to comply with the FDIC's proxy rules. Its officers, directors and 10% shareholders would be relieved of the reporting requirements and restrictions on insider trading imposed by Section 16 of the 1934 Act.

After the Effective Date of the Merger, the Board of Directors of First American will comprise the members of the Board of Directors of First American immediately preceding the Effective Date of the Merger and, similarly, the principal executive officers of First American will be the principal officers of First American immediately preceding such effective date.

Directors; Interest of Directors in the Merger

Following the Effective Date of the Merger, First American will have an initial Board of Directors consisting of _____ present directors of First American. They will serve until the next annual meeting, which management expects to be held in April, 198~~7~~, or until their successors are elected and qualify. No director has any interest in the merger other than as a holder of First American Common Stock and each director's holdings of such stock will be converted into the right to receive $ 42 cash per share in the same manner as all other public shareholders' shares will be converted. If the merger is made effective, First American expects to sell shares of First American Common Stock to directors in ~~order that they may comply~~ compliance with the provisions of the Virginia Banking Act, which in general require a director of a Virginia bank to hold shares in the Bank with an aggregate par value of $1,000. Under provisions of the agreements ~~which~~ that First American expects to enter into with the directors, they will be obliged [to assign all dividends on these qualifying shares to First American and] to resell the shares for the original purchase price to First American when they cease being a director of First American.

Federal Income Tax Consequences

The exchange by shareholders of First American Common Stock for cash pursuant to the merger will be treated as a taxable sale of stock for federal income tax purposes. Accordingly, the principal federal income tax consequences to holders of First American Common Stock will be as follows:

1. Each shareholder will recognize gain or loss, the amount recognized by a shareholder to be the difference, if any, between (i) the amount of cash received pursuant to the merger and (ii) the cost or other tax basis of the shareholders' shares of First American Common Stock.

2. If such stock is a capital asset in the hands of the shareholder, the gain or loss will be a capital gain or loss. A capital gain or loss will generally be long-term if the shares have been held more than six months and short-term if not held more than six months at the Effective Date of the Merger.

?—> 3. Under current law, for taxpayers who are not corporations, 60% of any excess of net long-term capital gain over net short-term capital loss recognized during a taxable year may be deducted from gross income for Federal income tax purposes. Consequently, depending upon his particular situation, a non-corporate shareholder who recognizes long-term capital gain pursuant to the merger may be entitled to deduct a portion of such gain from his gross income. Because the maximum Federal income tax rate for non-corporate taxpayers under current law is 50%, the deduction relating to long-term capital gain results in a maximum federal income tax rate of 20% on any long-term capital gain. Any amount which a shareholder is entitled to deduct will, however, constitute an item of "tax preference" to which the 20% alternative minimum tax may apply, depending upon each such shareholder's individual circumstances. Net short-term capital gain generally is taxable in full at the same tax rates as

ordinary income. See paragraph 5 below concerning the possible effect of proposed changes in Federal income tax laws.

4. Under current law, for taxpayers that are corporations, any excess of net long-term capital gain or net short-term capital loss recognized during a taxable year generally is subject to a Federal income tax rate of no more than 28%. A portion of such excess generally will constitute an item of "tax preference" to which the 15% minimum tax for corporations may apply, depending on the taxpayers particular situation. Net short-term capital gain generally is taxable in full at the same tax rates as ordinary income. See paragraph 5 below concerning the possible effects of proposed changes in the Federal income tax laws.

5. [TO COME FROM H&W TAX DEPARTMENT]

The Federal income tax consequences as set forth above are for general information only. Each shareholder should consult his tax adviser as to particular consequences of the merger to him, including the application of state, local and foreign laws.

Consequences if the Merger is not Consummated

No significant changes in First American's business is contemplated if the merger is not consummated.

Source of Financing

Financing the proposed merger will require approximately $____ million in cash to pay the public holders of all outstanding shares of First American Common Stock for their shares.

[MATERIAL TO COME ON SOURCE]

THE PLAN OF MERGER

The Plan of Merger is set forth in full as Appendix I. Information contained in the narrative portion of this Proxy Statement with respect to the proposed transaction is a summary only, and reference is made to Appendix I for a complete account of the proposed merger. In brief, the Plan of Merger provides for the merger of First American into FAB Bank, which in an "interim bank" organized by Virginia Bankshares solely to carry out the proposed merger. At the Effective Date of the Merger, each outstanding shares of First American Common Stock, other than shares owned by Virginia Bankshares, will be converted into the right to receive $42 in cash from FAB Bank.

Approvals; Effective Date; and Resulting Bank

If the Plan is approved by the affirmative vote of the holders of more than two-thirds of First American Common Stock entitled to vote, which the Board expects to occur because Virginia Bankshares owns more than this number of shares and has indicated its intention to vote for the Plan of Merger, the merger will become effective upon the filing of Articles of Merger with the Corporation Commission in accordance with Virginia law. The date and time of such filing is referred to herein as the "Effective Date of the Merger." On the Effective Date of the Merger, First American Bank of Virginia, as the Resulting Bank, will continue to own all of the business, property, assets, liabilities and obligations of First American.

The merger requires the approval of the Corporation Commission and the FDIC. FAB Bank must receive a certificate of authority to begin business as a bank from the Corporation Commission and approval of the FDIC. Receipt of all such approvals is a prerequisite to the effectiveness of the merger.

Exchange of First American Common Stock for Cash

After the Effective Date of the Merger, each holder of outstanding certificates representing First American Common Stock, other than Virginia Bankshares, upon surrender of certificates to First American, will be entitled to receive therefor the amount of cash into which First American shares have been converted by virtue of the merger. Until such surrender, each outstanding certificate representing First American Common Stock will be deemed no longer outstanding and instead will represent only the right to receive $ 42 per share of First American Common Stock into which such certificates shall have been converted. Cash to be issued to former holders of First American Common Stock shall be deemed in full satisfaction of all rights appertaining to First American Common Stock.

Conditions to Merger

The merger will not occur unless each of the conditions to its effectiveness has been met or waived by the party for whose benefit such condition shall have been given. The principal conditions in the Plan of Merger are that the Plan of Merger shall have been approved by holders of more than two-thirds of the shares of First American Common Stock entitled to vote and

approval of the merger by regulatory authorities having jurisdiction.

Termination of the Plan of Merger

The Plan of Merger will terminate unless all conditions are satisfied and the Effective Date occurs on or before March 31, 1987 and prior thereto upon the disapproval of any regulatory agency having jurisdiction.

Operation of the Business of First American

The business conducted by First American prior to consummation of the merger will be continued thereafter by the Resulting Bank.

Board of Directors and Management of the Resulting Bank

The Board of Directors of First American as comprised prior to the Effective Date of the Merger will continue to serve as the Board of Directors of the Resulting Bank and, similarly, the executive officers of First American prior to the Effective Date of the Merger will continue to serve as such Executive Officers after the Effective Date of the Merger.

BUSINESS OF FIRST AMERICAN BANK OF VIRGINIA

General

First American was formed in 1978 by the merger of Clarendon Bank & Trust Company, Alexandria National Bank of Northern Virginia, and Arlington Trust Company, Incorporated under the charter of Arlington Trust and with the title of First American Bank of Virginia.

In 1983, five banks which were majority-owned subsidiaries of Virginia Bankshares -- First Peninsula Bank and Trust Company, The First National Bank of Laxington, The Peoples National Bank of Leesburg, Shenandoah Valley National Bank and Valley National Bank -- were merged into First American in exchange for a combination of cash (in the case of First Peninsula) and stock of First American (in the case of the four other banks).

As a result of the expansion of its business in 1983, First American now serves 18 communities in Northern Virginia, Hampton Roads, Loudoun County and the Shenandoah Valley. Headquartered in McLean, First American provides financial services to individuals, businesses and governmental units through ____ branch offices located in these fast growing areas of Virginia. First American, which has approximately ___ full time employees, serves more than ____ individuals and ___ businesses in its extensive service area. ~~As of June 30, 1986, First~~ First American had total assets of $_____ billion, deposits of $_____ billion, loans net of unearned income of $_____ million and equity capital of $_____ million.

Services

First American's services include checking, savings and time deposit accounts offered to individual, business, public and institutional customers; industrial, commercial, consumer, real estate and agricultural loans; international banking services; processing of collections, and trust services. The trust department had approximately $____ million of assets under management as of ~~June 30, 1986.~~ First American also provides

access for its customers to "MONEY EXCHANGE" (R) automated teller machines located in Virginia, Maryland, and the District of Columbia.

The following ratios are furnished for each of the three fiscal years indicated.

	1986	1985	1984	1983
Net income to average equity capital accounts		%	%	%
Net income to average daily total deposits				
Average daily loans to average daily deposits				

Competition

The markets served by First American are highly competitive. Approximately ____ other banks with over ____ branches operate in these markets. Several of these competing banks have statewide operations in Virginia. In addition, savings and loan institutions or branches of such institutions, credit unions, finance companies and other competitors or potential competitors operate in First American's service areas. First American estimates that it has nearly ___% of total commercial bank deposits in the Northern Virginia market, ___% in Hampton Roads, ___% in Loudoun County, and ___% in the Shenandoah Valley.

First American does not believe that a material part of its business is dependent upon a single customer or a few customers, the loss of any one or more of whom would have a materially adverse effect on its business.

First American is not a party to any material legal proceedings, other than those arising out of the ordinary course of its business, except for the following:

[DESCRIBE IF ANY]

Properties

The main offices of First American are located in a modern office building owned by First American and located at 1970 Chain Bridge Road, McLean, Virginia. First American owns ___ and leases ___ banking offices.

First American considers all of the properties owned or leased by it to be suitable and adequate for their intended purposes.

PRO FORMA CAPITALIZATION

The following table sets forth the capitalization of First American as of ~~June 30, 1986~~ and the pro forma capitalization of First American assuming the merger was effective June 30, 1986. The merger will be accounted for as a purchase.

~~June 30, 1986~~
(Unaudited in thousands)

Long Term Debt:	Existing	Adjustments	Pro Forma
6% Capital Notes due 1993	$ 1,500	____	$ 1,500
6% Capital Notes due 1987	322	____	322
Mortgage Notes Payable:			
Shareholders Equity:			
Common Stock, authorized 10,000,000 shares, outstanding 4,727,449 shares	47,275	( )	____
Total long-term debt and shareholders equity	$____	$____	$____

PER SHARE DATA

(Unaudited)

The following tabulation presents historical per share data for First American. Pro forma combined per share data for the Resulting Bank is omitted as the merger does not affect the information. Such data is based on historical financial statements for First American Bank of Virginia appearing elsewhere in this Proxy Statement. This data has been adjusted for stock splits and stock dividends.

	Year Ended December 31					Six Months Ended June 30,	
	1985	1984	1983	1982	1981	1986	1985
Historical Earnings per Common Share:							
Income before securities gains and losses.....							
Net Income.....							
Cash Dividends Declared per Common Share:							
Book Value per Common Share (Period End):							

RECENT MARKET PRICES; DIVIDEND HISTORY

First American Common Stock is traded in the over-the-counter market. The following table sets forth for the periods indicated the prices per share and the amount of cash dividends per share by quarters for 1984, 1985 and 1986 ~~to date~~.

1986

Quarter Ended	Sales*		Dividends per Share
	High	Low	
March 31	$	$	
June 30			
September 30			
(Through ___)			

1985

Quarter Ended	Bid/Sales*		Asked		Dividends per Share
	High	Low	High	Low	
March 31	$	$	$	$	
June 30					
September 30					
December 31					

1984

Quarter Ended	Bid		Asked		Dividends per Share
	High	Low	High	Low	
March 31	$	$	$	$	
June 30					
September 30					
December 31					

* NASDAQ revised its method of reporting stock prices on April 1985 to report only high and low sales prices.

DIRECTORS AND OFFICERS

[Here insert information respecting directors and officers, their business experience, remuneration, benefits and transactions in identical form from the Proxy Statement for the 1986 Annual Meeting]

use our info.-enclosed

DESCRIPTION OF FIRST AMERICAN COMMON STOCK

First American has authorized capital stock consisting of 10 million shares of Common Stock. Each share of First American Common Stock is entitled to one vote in person or by proxy on all matters referred to shareholders and the right to receive pro-rata such dividends as may be declared by the Board of Directors from time to time out of funds legally available therefore.

Holders of First American Common Stock have no liability except for unpaid subscriptions to First American Common Stock. In the event of the liquidation of First American, holders of First American Common Stock would share prorata in all assets remaining after provision for liabilities as provided by the Virginia Stock Corporation Act. First American Common Stock has no conversion rights, no provision for redemption, no sinking fund rights, no preemptive rights and no cumulative voting rights.

PROXY SOLICITATION

Proxies are being solicited by and on behalf of First American's Board of Directors. All expenses of this solicitation, including the cost of preparing and mailing this Proxy Statement, will be borne by First American. In addition to solicitation by use of the mails, proxies may be solicited by directors, officers and employees of First American in person or by telephone, telegram or other means of communications. Such directors, officers and employees will not be additionally compensated but may be reimbursed for out-of-pocket expenses in connection with such solicitation. Arrangements also will be made with custodians, nominees, and fiduciaries for forwarding of proxy soliciting materials to beneficial owners of First American Common Stock held of record by such person, and First American may reimburse such custodians, nominees and fiduciaries for reasonable expenses incurred in connection therewith.

FINANCIAL STATEMENTS

The Balance Sheets at December 31, 1985 and 1984 and the related Statements of Income, Statements of Changes in Shareholders Investment and Statements of Changes in Financial Position of First American for each of the three years ended December 31, 1985, the Notes to Financial Statements, and the Report dated January 24, 1986 of Arthur Andersen & Co., independent public accountants, on the examination of such financial statements, the Financial Review, the Analysis of Interest Income and Selected Inflation Data, all included in Appendix II to this Proxy Statement, are incorporated by reference herein. The Balance Sheets at June 30, 1986 and 1985

and the related Statements of Income, Statements of Changes in Shareholders Investment and Statements of Changes in Financial Position of First American for the six months ended June 30, 1986 and June 30, 1985, the Notes to Financial Statements, all of which are unaudited, and Management's Discussion and Analysis, included in First American's report on Form 7-4 for the quarter ended June 30, 1986, all included in Appendix III, are incorporated by reference herein.

CURRENT INFORMATION

First American Bank of Virginia is subject to the information requirements of the 1934 Act, and in accordance therewith files reports, proxy statements and other documents and information with the Federal Deposit Insurance Corporation. First American's officers, directors and principal shareholders are also presently subject to certain filing requirements, as well as certain trading restrictions, imposed by the 1934 Act. Such reports, proxy statements and other documents and information are available for inspection and copying at the Federal Deposit Insurance Corporation, 550 17th Street, N.W., Washington, D. C. 20429.

OTHER MATTERS

The Board of Directors is not aware of any matters to be presented for action at the Annual meeting other than those described in this Proxy Statement. However, if other matters properly come before the meeting or any adjournment thereof, the person or

persons voting the proxies will vote them in accordance with their best judgment.

By Order of the Board of Directors.

Milton L. Drewer, Jr.,
President

McLean, Virginia
, 1986

Exhibit Index

Exhibit I - Plan of Merger dated as of _____, 1986.

Exhibit II - First American's financial statements for the year ended December 31, 1985 (audited).

Exhibit III - First American's quarterly report on Form F-4 for the quarter ended June 30, 1986 (unaudited).

PLAINTIFF'S EXHIBIT V

J. Orfe's Notes of 4/21/87 Stockholders' Meeting

[Steps we took for analysis]

BOARD REVIEWED THE PROPOSAL

REFERRED TO THE EXECUTIVE COMMITTEE—11 AND MR. BROYHILL

THE COMMITTEE AFTER FURTHER REVIEW DECIDED TO ASK KEEFE, BURRETTE & WOODS TO MAKE A PRESENTATION AND TO ANSWER QUESTIONS THAT WE MIGHT HAVE.

MET, DECIDED THEIR FIGURES AND ASSUMPTIONS WERE REASONABLE AND DECIDED IT WOULD BE INAPPROPRIATE TO HAVE THE EXPENSE OF AN ADDITIONAL APPRAISAL.

COMMITTEE DISCUSSED FURTHER AND THEN VOTED UNANIMOUSLY.

BOARD OF DIRECTORS DISCUSSED THE ISSUES, THE STUDY OF KEEFE, BURRETTE & WOODS, AND RECEIVED THE RECOMMENDATIONS OF THE COMMITTEE.

THE BOARD VOTED UNANIMOUSLY.

Consideration

Market Value

Book Value

Keefe Bruyette & Woods report

Our analysis of Value of assets

fact that no one else would offer
such as this and that stockholders
may object if the $2 was refused

PLAINTIFF'S EXHIBIT W

COMPENSATION PAID DIRECTORS FOR 1986

Baker	$ 18,900
Bradley	$ 19,200
Broyhill	$ 15,900
Chamberlin	$ 24,100
Chisman	$ 19,700
Dewberry	$ 20,200
Dudley	$ 6,000
Gosnell	$ 5,100
Johnson	$ 13,000
Lindsay	$ 21,500
Maxfield	$ 23,900
Mays	$ 16,500
Michael	$ 20,000
Peterson	$ 12,200
Ridgely	$ 32,100
Saunders	$ 19,300
Schar	$ 15,400
C. Smith	$ 31,600
V. Smith	$ 18,100
Steinberg	$ 5,900
Thomas	$ 21,600
Yeonas	$ 30,000
	$410,200

PLAINTIFF'S EXHIBIT Z

KEEFE, BRUYETTE & WOODS, INC.

SPECIALISTS IN BANKING

Two World Trade Center 85th Floor

New York, N.Y. 10048

April 13, 1987

Mr. Milton L. Drewer, Jr.
Chairman of the Board and President
First American Bank of Virginia
1970 Chain Bridge Road
McLean, Virginia 22102

Dear Milt,

At the request of Jack Beddow I have enclosed copies of the handouts we used in our discussion at the Board of Directors meeting last January.

If you have any questions please give me a call.

Sincerely yours,

/s/ John M. Boyle
JOHN M. BOYLE
Vice President

JMB sgw

Enclosure

KEEFE BRUYETTE & WOODS, INC.

Peer Group Ratio Comparison

Virginia includes those banks labeled as such on Exhibit 1. The Regional figures represent the entire list of banks on the same exhibit.

	12/31/85 P/E (1)	12/31/85 MKT/BK	7/15/86 P/E (2)	7/15/86 MKT/BK	12/15/86 P/E (2)	12/15/86 MKT/BK	1/28/87 P/E (3)	1/28/87 MKT/BK
Virginia	9.7x	157%	11.4x	199%	10.1x	165%	9.4x	165%
Regional	10.4x	147%	12.0x	187%	10.4x	159%	9.6x	155%

(1) Based on 1985 KBW earnings estimate

(2) Based on 1986 KBW earnings estimate

(3) Based on 1987 KBW earnings estimate

	12/31/85 P/E	12/31/85 MKT/BK	7/15/86 P/E	7/15/86 MKT/BK	12/15/86 P/E	12/15/86 MKT/BK	1/28/87 P/E	1/28/87 MKT/BK
First American Bank of VA	6.8x	104%	6.3x	101%	6.4x	100%	5.7x	99%

Assumptions: (1) Shares outstanding: 4,896,287

(2) Earnings Estimate:
1985: $4.48: As reported in 1985 annual report
1986: $5.06: Based on unaudited prelimanary 12/31/85 results
1987: $5.82: Based on 1987 preliminary budget dated 12/15/86

(3) Book Value:
1985: $29.42: As reported in 1985 annual report
1986: $33.30: Based on unaudited preliminary 12/31/85 results. For interim period calculations in 1986 book value was assumed to grow on a straight-line basis between $29.42 and $33.30.

(4) Stock prices are approximations based on attached exhibit outlining prices paid by First American Bankshares, Inc. for the stock of First American Bank of Virginia.

KEEFE, BRUYETTE & WOODS, INC.

The following matrix compares the price/earnings multiple and market/book percentages for First American Bank of Virginia as a percentage of the respective comparable figures for the Virginia and Regional peer groups.

	12/31/85		7/15/86		12/15/86		1/28/87	
	P/E	MKT/BK	P/E	MKT/BK	P/E	MKT/BK	P/E	MKT/BK
Virginia	70%	66%	55%	51%	63%	61%	61%	59%
Regional	65%	71%	53%	54%	62%	59%	59%	64%

KEEFE, BRUYETTE & WOODS, INC.

Exhibit 1

Peer Group Stock Prices (1)

	12/31/85	7/15/86 (2)	12/15/86	Intra-Day Bid 1/28/87
Virginia				
First Virginia	$ 26.625	$ 32.50	$ 29.75	$ 30.375
Central Fidelity	$ 25.50	$ 33.50	$ 29.625	$ 31.75
Dominion	$ 35.375	$ 25.125	$ 18.375	$ 18.625
Sovran	$ 32.25	$ 40.125	$ 35.625	$ 35.00
United Virginia	$ 22.8125	$ 32.00	$ 30.625	$ 29.625
Signet	$ 30.25	$ 34.25	$ 32.25	$ 34.125
Maryland				
First Maryland (3)	$ 27.125	$ 36.50	$ 29.125	$ 32.50
Mercantile	$ 69.25	$ 42.625	$ 39.00	$ 39.25
Baltimore Bancorp	$ 15.00	$ 22.00	$ 17.625	$ 18.00
Maryland National	$ 35.625	$ 46.375	$ 40.50	$ 43.50
DC				
Riggs	$ 31.00	$ 37.25	$ 29.625	$ 28.375

(1) All prices have been adjusted for stock splits.

(2) Approximate high point of bank stock market in 1986

(3) 48% owned by Allied Irish Banks, PLC

(1)Additional Shares Acquired by First American Bankshares, Inc.
in First American Bank of Virginia
since January 1, 1984

Date	Description	Number of Shares	Per Share Amount	Aggregate Amount
01/12/84	Market Purchase	560	$25.71	$ 14,396.00
03/19/84	Fractional Share Sale	-	-	-18.98
04/11/84	Market Purchase	1,883	24.50	45,643.50
04/20/84	Market Purchase	7,872	24.50	192,864.00
05/01/84	Market Purchase	589	24.50	14,430.50
05/10/84	Market Purchase	300	24.50	7,350.00
06/30/84	Round Hill Natl Bank Merger	71,694	-	-
07/12/84	Private Purchase under Agreement with Retiring Bank President	100	65.55	6,555.00
08/13/85	Market Purchase	7,366	31.75	233,870.50
01/08/86	Market Purchase	230	30.00	6,900.00
02/11/86	Market Purchase	1,568	31.00	48,608.00
03/31/86	Stock Rights Offering	153,814	30.00	4,614,420.00
11/26/86	Market Purchase	285	32.00	9,120.00
12/24/86	Market Purchase	700	33.00	23,100.00

(1) Information provided by First American Bankshares, Inc.

Acquisition Premiums

American Security Corp.; Washington, D.C.

Closing price day of announcement:	$35.25
Market/Book:	162%
Price/Earnings (1):	14.1x
Price range 60 days before announcement:	$33.00-$39.50
Premium to market paid:	0%

Third National Corp.; Nashville, Tenn.

Closing price day of announcement:	$34.25
Market/Book	196%
Price/Earnings (1):	11.4x
Price range 60 days before announcement:	$33.25-$38.00
Premium to market paid:	11%

Citizens Fidelity Corporation; Louisville, KY

Closing price day of announcement:	$32.875
Market/Book:	239%
Price/Earnings (1):	13.1x
Price range 60 days before announcement:	$30.375-$34.875
Premium to market paid:	8%

(1) 1986 KBW estimate used in calculation.

KEEFE, BRUYETTE & WOODS, INC.

SELECTED PEER GROUP RATIOS

	ROA%	ROE%	Equity/ Assets%	Non-performing Assets/ Loans%	Reserves/ Non-performing Assets%
First VA (1)	1.36	17.87	7.59	.64	205.20
(2)	1.32	17.04	7.72	.56	245.21
Central Fidelity	1.04	16.65	6.27	1.28	106.49
	1.20	15.51	7.75	.97	137.28
Dominion	.90	15.64	5.73	1.39	116.75
	.89	14.72	6.05	1.31	153.97
Sovran	1.07	16.94	6.32	.26	683.77
	1.05	18.13	5.79	.35	417.68
United Virgina	1.04	16.71	6.27	.63	216.04
	.94	16.11	6.40	.76	174.60
Signet	1.06	18.22	5.82	1.18	126.89
	1.03	18.08	5.72	1.05	141.54
First MD	.68	11.05	6.15	1.77	120.30
	.87	13.94	6.22	1.40	164.74
Mercantile	1.58	15.50	10.18	.75	245.00
	1.40	14.42	9.68	.66	261.25
Baltimore Bancorp	.97	9.02	10.81	.35	330.22
	.95	10.33	9.20	.40	375.84
MD National	1.03	16.56	6.19	1.14	147.20
	1.11	17.67	6.26	.99	185.85
Riggs	.63	12.96	4.83	.60	289.60
	.56	9.13	6.11	.32	486.01
First American (1)	.92	15.39	6.00	.29	217.54
Bank of Virginia (3)	.93	15.65	5.95	.28	260.81

(1) Year-end 1985
(2) 9 months; 9/30/86
(3) 10 months; 10/31/86

PLAINTIFF'S EXHIBIT BB
FABV Draft Board Resolutions

Draft-Resolutions (Ewer45)

FIRST AMERICAN BANK OF VIRGINIA

Board Resolutions
February 12, 1987

RESOLVED, that the Agreement and Plan of Merger in the form presented to this meeting between Virginia Bankshares, Inc., FAB Acquisition Bank and First American Bank of Virginia, a copy of which is ordered to be filed with the minutes of this meeting, providing for the merger (the "Merger") of FAB Acquisition Bank into First American Bank and pursuant to which holders of shares of First American Bank common stock, other than Virginia Bankshares, will receive $42 cash per share is hereby approved and found to be in the best interests of the Bank; and

RESOLVED, that the Agreement and Plan of Merger is hereby approved and found to be in the best interests of First American Bank's shareholders and directed to be submitted for consideration by First American Bank's shareholders with the recommendation of the Board of Directors that it be approved by them; and

RESOLVED, that the President and/or any Executive Vice President of the Bank are hereby authorized to execute and deliver the Agreement and Plan of Merger on behalf of the Bank; and

RESOLVED, that the officers named in the foregoing resolution are hereby authorized to agree to such changes in the Agreement and Plan of Merger as they, upon the advice of counsel, may deem necessary or desirable to carry out the objectives of the Agreement and Plan of Merger; and

RESOLVED, that the President, any Executive Vice President or any Vice President of First American Bank is hereby authorized and directed to take or cause to be taken all actions and to do all things required under the

Agreement and Plan of Merger or by the laws of Virginia or the United States in order to consummate the Merger provided for therein and the other transactions contemplated by the Agreement and Plan of Merger, or which may be necessary or appropriate for such purpose, including but not limited to preparation and filing of applications to the State Corporation Commission of Virginia, the Federal Deposit Insurance Corporation and other regulatory agencies seeking approval of the Merger; and

RESOLVED, that the annual meeting of the shareholders of the Bank, at which directors will be elected and the Agreement and Plan of Merger will be considered, is hereby called to be held on _____, 1987 at the main office of the Bank at _____ a.m.; and

RESOLVED, that if delays in clearing the Bank's proxy soliciting material with appropriate regulatory agencies should make it impossible to hold the annual meeting on this date, the Chairman of the Board and President of the Bank is authorized to change the time of meeting and the mailing date of the proxy material so that the annual meeting can be held at a convenient date as soon as possible after such date; and

RESOLVED, that the preliminary proxy soliciting material, as such material relates to the Agreement and Plan of Merger, submitted to this meeting is hereby approved with the officers named in the foregoing resolutions being authorized to agree to such changes, amendments and additions as they, upon the advice of counsel, may deem necessary or desirable to have such material comply with applicable rules and regulations of state and federal regulatory agencies; and

RESOLVED, that any action of the kinds described in the resolutions next preceding taken by officers of First American Bank prior to the meeting at which these resolutions are adopted is hereby ratified and confirmed in all respects.

77/45

PLAINTIFF'S EXHIBIT EE

BOARD OF DIRECTORS MEETING

FEBRUARY 12, 1987

AGENDA

1. Call to Order.

* * * *

16. Approve date of April 28, 1987 for Annual Meeting with mailing of proxies set for April 3 and record date to close books for voting purposes at the annual meeting as of the close of business March 13, 1987. — Drewer

17. Act on Executive Committee Recommendation on Tender Offer — Drewer

18. Old Business

19. New Business

20. Adjournment 10:20 a.m.

DIRECTOR—DEFENDANTS' EXHIBIT 2

Minutes of Shareholders' Meeting

April 21, 1987

The Annual Meeting of the Stockholders of the First American Bank of Virginia was held in the Bank's meeting room at Tysons Corner, McLean, Fairfax County, Virginia, on Tuesday, April 21, 1987, at 2:00 p.m.

Mr. Milton L. Drewer, Jr., Chairman of the Board and Chief Executive Officer called the meeting to order.

The Chairman announced the Minutes of the Annual Shareholders Meeting held on April 15, 1986 were available for inspection. Mr. Thomas Mays made a motion to dispense with the reading of those minutes. Mr. Thomas Chisman seconded the motion and it was carried.

The Chairman reviewed the rules of procedure to be followed for the meeting. He stated the rules as follows: (1) only a shareholder and a proxy holder may have the privilege of the floor, and before speaking he must first stand, identify himself and whom he represents and be recognized by the Chairman; (2) the Chairman reserves the right to rule on the relevancy and or propriety of any motions or statements from the floor.

The Chairman stated there were two items of business as presented in the proxy statement, and that there would be two discussion periods during the meeting, one for each of the two items of business. He requested that questions and comments be confined to the single subject on the agenda then being considered. He also requested that comments be limited to three minutes so that any shareholders who wished to speak would have an opportunity to do so.

The Chairman stated that ballots would be distributed to shareholders who wished to vote in person on any item. Signed ballots would then be gathered for delivery to the inspectors.

The Chairman announced that a complete list of shareholders of the Bank entitled to vote at this meeting, with the address and number of shares held by each, had been on file at the principal executive offices since April 11, 1987 and subject to inspection by any shareholder. The same list was present and subject to inspection by any shareholder at any time during the meeting.

The Chairman called for the Secretary's Report. Mr. Warren T. Braham, Corporate Secretary, presented proof by affidavit that notice of the meeting had been duly given and that a proxy statement had been furnished to every holder of common stock of record as of March 6, 1987.

Mr. Braham also reported that the inspectors of election, Harry Lewis Hutcherson, Jr. and Gregory Edward Reynolds of Arthur Andersen & Co., had filed their oaths of office and their certificate stating that the holders of at least a quorum of the common stock of the company were present in person or represented by proxy at this meeting.

The Chairman declared the 1987 Annual Meeting of Shareholders of First American Bank of Virginia to be officially convened.

Mr. Eric W. Erdossy gave the President's Report.

Mr. Donald W. Lee, Chief Financial Officer, gave the financial report.

Dr. George W. Johnson nominated the 21 individuals named in the proxy statement to serve as directors of the Bank for the coming year or until their successors were chosen. Mr. E. Guy Ridgely seconded. The nominees were:

Emanuel A. Baker, Jr.
Jack W. Beddow
Harriet F. Bradley
Joel T. Broyhill
Thomas B. Chamberlin
Thomas P. Chisman
Sidney O. Dewberry
Milton L. Drewer, Jr.
Eric W. Erdossy
George W. Johnson
Charles T. Lindsay, Jr.
Donald R. Maxfield
Thomas G. Mays
Linda H. Michael
Milton V. Peterson
Glenn W. Saunders, Jr.
Dwight C. Schar
Charles H. Smith, Jr.
Verlin W. Smith
Henry A. Thomas
Stephen G. Yeonas

There were no further nominations. The Chairman called for the casting and collecting of ballots.

The Chairman called for a motion and second for approval or disapproval of the Agreement and Plan of Merger. He stated under the Agreement and Plan of Merger, dated February 12, 1987, FAB Acquisition Bank, a wholly owned subsidiary of Virginia Bankshares, Inc., would be merged into the Bank. Each holder of common stock of the Bank (other than Virginia Bankshares, Inc.) would be entitled to receive $42.00 in cash, without interest, for each share held.

Mr. Glenn W. Saunders, Jr. moved that the shareholders of the Bank approve the Agreement and Plan of Merger as set forth in the proxy statement. Mr. Thomas B. Chamberlin seconded the motion.

After a period of questions and discussion, the Chairman called for the casting and collecting of ballots.

The Inspectors of Election gave their report as follows:

There were issued and outstanding and entitled to vote at this meeting a total of 4,896,287 shares of common stock. There were present in person or by proxy the holders of 4,641,211 shares of such common stock, or 94%. Accordingly, a quorum was present at this meeting.*

The 21 directors proposed in the proxy statement were elected to the Board of Directors. The minimum number of common share votes received by any of these directors was 4,597,787 votes, or 93.9%.

The proposal to approve the Agreement and Plan of Merger was approved by the votes of holders of 4,486,713 shares in favor (or 96%) and 124,182 shares against (or 2%).*

The Chairman stated the report from the inspectors covering the election of directors and the approval of the Agreement and Plan of Merger would be filed with the records of the meeting.

There was no further business presented before the meeting. Mr. Thomas Chamberlin moved that the meeting adjourn. After second and vote, the meeting was adjourned at 3:15 p.m.

* Inadvertently, the Inspectors of Election gave the following numbers for their report, which report has since been supplemented: Present in person or proxy and entitled to vote 4,633,595; Votes for Plan Merger 4,544,383; Against Plan Merger 70,182.

/s/ Milton L. Drewer, Jr.
MILTON L. DREWER, JR.
Chairman

/s/ Gwen J. King
GWEN J. KING
Secretary to the Board

DIRECTOR—DEFENDANTS' EXHIBIT 3

FDIC
Federal Deposit Insurance Corporation
Marquis One Building
345 Peachtree Center Avenue, N.E., Suite 1200
Atlanta, Georgia 30303 Atlanta Regional Office

April 27, 1987

Mr. Milton L. Drewer, Jr.
Chairman of the Board and
Chief Executive Officer
First American Bank of Virginia
1970 Chain Bridge Road
McLean, Virginia 22102

Dear Mr. Drewer:

Enclosed herewith is our combined Order and Basis for Corporation Approval ("Order and Basis") approving the application submitted by First American Bank of Virginia, McLean, Virginia, for consent to merge with FAB Acquisition Bank, Richmond, Virginia, under the charter of and with the title First American Bank of Virginia. Acting on behalf of the Board of Directors of the Corporation under delegated authority, I have approved the application subject to the conditions included in the attached Order and Basis. Please advise this office of the exact date the merger transaction is consummated.

If an extension of the time limitation included in the Order is required, a letter requesting a specified extension should be submitted to the Atlanta Regional Office.

Very truly yours,

/s/ Edwin B. Burr
EDWIN B. BURR
Regional Director

Enclosure

cc: Mr. Lathan M. Ewers, Jr.
Hunton & Williams
P.O. Box 1535
Richmond, Virginia 23212

FEDERAL DEPOSIT INSURANCE CORPORATION

In Re: First American Bank of Virginia
McLean, Fairfax County, Virginia
and
FAB Acquisition Bank
Richmond, Virginia
(Application for Consent to Merge)

ORDER AND BASIS FOR
CORPORATION APPROVAL

Pursuant to Section 18(c) and other provisions of the Federal Deposit Insurance Act, an application has been filed by First American Bank of Virginia, McLean, Fairfax County, Virginia, a State nonmember bank with total resources of $2,849,847,000, as of December 31, 1986, for consent to merge with FAB Acquisition Bank, Richmond, Virginia, under the charter of and with the title First American Bank of Virginia.

Formation of FAB Acquisition Bank and the merger transaction are being effected to enable Virginia Bankshares, Inc., which already owns approximately 85% of the outstanding stock of First American Bank of Virginia, to acquire all of the voting shares of First American Bank of Virginia. Following consummation of the merger, the resulting bank will operate the same banking business with the same management at the same location now being served by First American Bank of Virginia. The proposal, *per se*, will not alter the competitive structure of commercial banking in the market served by First American Bank of Virginia or change the services which it has provided in the past.

In connection with the application, the Corporation has taken into consideration the competitive effects of the proposed transaction, the financial and managerial resources and future prospects of applicant and the resultant bank, and the convenience and needs of the com-

munity to be served. Having found favorably on these statutory factors and having considered all relevant material, it is the Corporation's judgment that the application should be and hereby is approved.

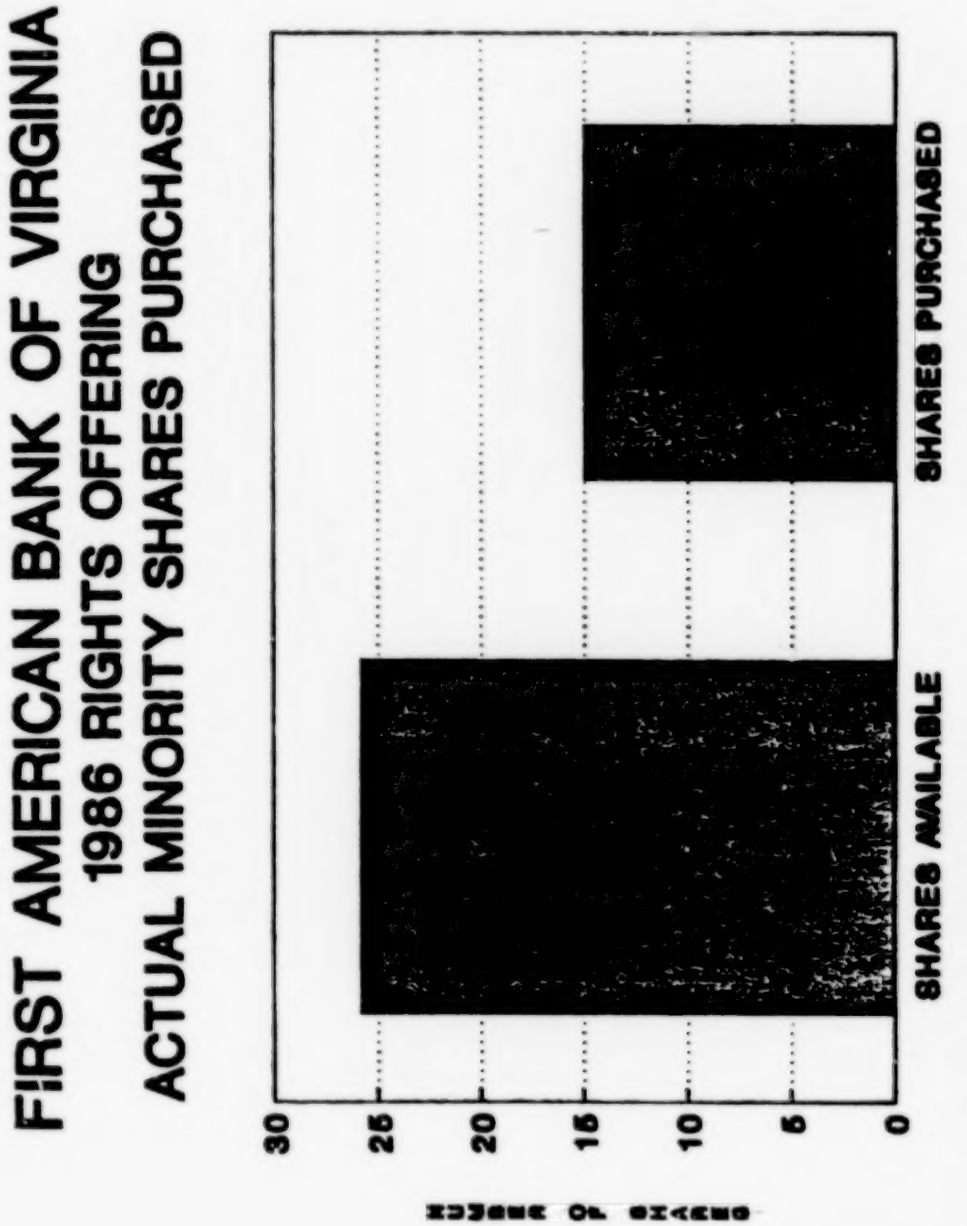
The merger transaction may not be consummated before the thirtieth calendar day following the effective date of this Order or later than six months from the date of this Order, unless such period is extended for good cause by the Corporation. Until the proposed transaction becomes effective, the Corporation shall have the right to alter, suspend, or withdraw its approval should any interim development be deemed by the Board of Directors to warrant such action.

By Order of the Regional Director of the Atlanta Regional Office, acting pursuant to delegated authority for the Board of Directors of the Corporation.

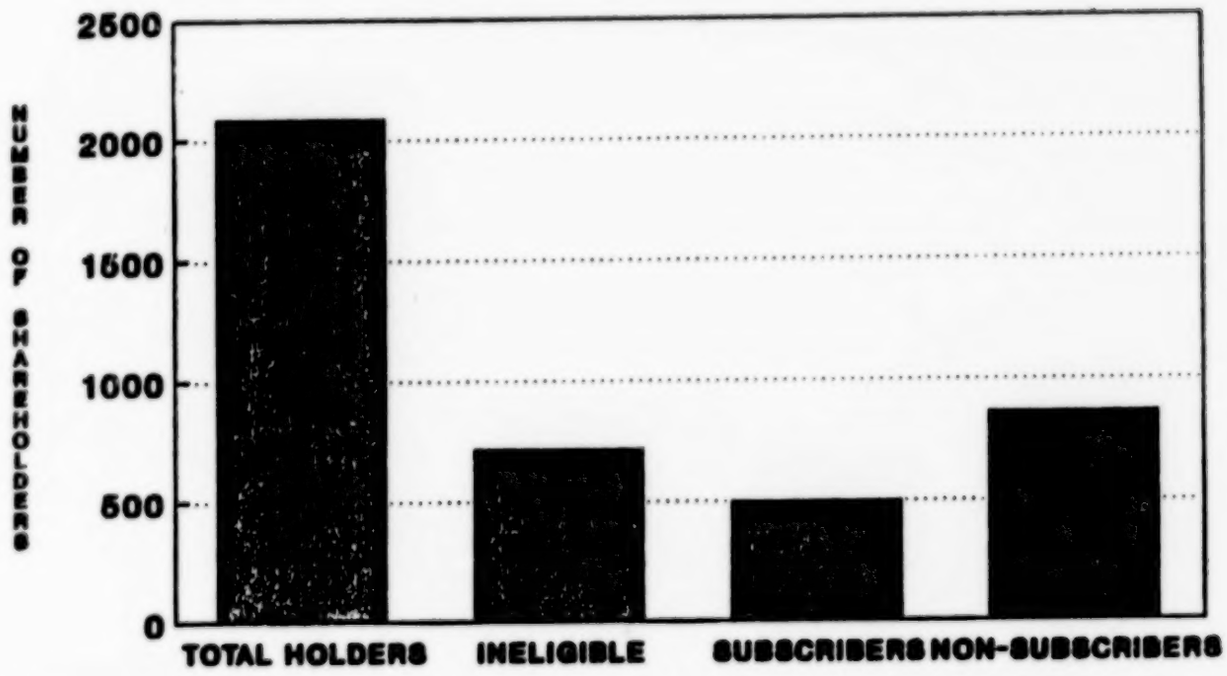
Dated at Atlanta, Georgia, this 27th day of April, 1987.

By: /s/ Edwin B. Burr
EDWIN B. BURR
Regional Director

DIRECTOR—DEFENDANTS' EXHIBIT 10

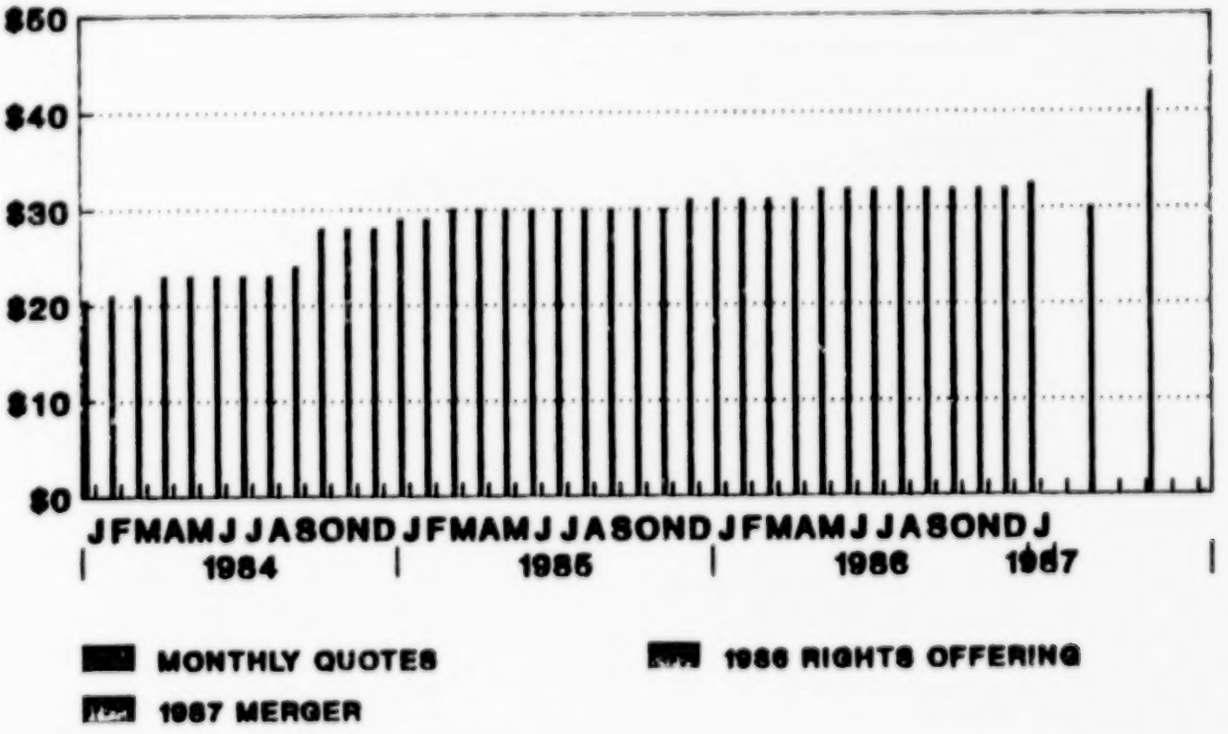


FIRST AMERICAN BANK OF VIRGINIA
1986 RIGHTS OFFERING
MINORITY PARTICIPATION



INELIGIBLE SHAREHOLDERS DID NOT HOLD
REQUISITE MINIMUM OF 25 SHARES

FIRST AMERICAN BANK OF VIRGINIA
STOCK PRICE JANUARY 1984 - JANUARY 1987



WASHINGTON POST WEEKLY QUOTES

CORPORATE—DEFENDANTS' EXHIBIT 1

FIRST AMERICAN BANKSHARES, INC.
MINUTES OF MEETING OF THE EXECUTIVE COMMITTEE OF THE BOARD OF DIRECTORS

July 17, 1986

A meeting of the Executive Committee of the Board of Directors of First American Bankshares, Inc., a Virginia corporation, was held at the offices of Clifford & Warnke, 815 Connecticut Avenue, NW, Washington, DC on Thursday, July 17, 1986, at 10:30 a.m.

There were present:

Robert A. Altman	Clark M. Clifford
Jack W. Beddow	Robert G. Stevens

constituting all the members of the Committee.

Clark M. Clifford, Chairman of the Committee, presided as Chairman of the meeting and Jack W. Beddow, Secretary of the Corporation, served as Secretary of the meeting.

• • • •

ACQUISITION OF MINORITY SHARES

Mr. Altman pointed out that Bankshares owns approximately 85% of the Common Capital Stock of First American Bank of Virginia with the balance of the stock being held by the public. He suggested that consideration be given to having Bankshares acquire all of the outstanding minority stock so that we would own 100%. The members then discussed the amount of capital that would be required and the advantages and disadvantages of proceeding with an acquisition. It was determined that the Executive Committee should continue to consider whether and in what manner such an acquisition should be carried out.

There being no further business to come before the meeting, upon motion, it adjourned.

/s/ Jack W. Beddow
JACK W. BEDDOW
Secretary

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 88-299-A

DORIS I. SANDBERG,
Plaintiff,

v.

VIRGINIA BANKSHARES, INC., *et al.*,
Defendants.

We, the jury, find as follows:

A. As to Count I (federal securities count):

1. We find against the following defendant(s):
[√] First American Bankshares, Inc.
[√] Virginia Bankshares, Inc.
[√] Emanuel A. Baker, Jr.
[√] Jack W. Beddow
[√] Harriet F. Bradley
[√] Joel T. Broyhill
[√] Thomas B. Chamberlin
[√] Thomas P. Chisman
[√] Sidney O. Dewberry
[√] Milton L. Drewer, Jr.
[√] Eric W. Erdossy
[√] George W. Johnson
[√] Charles T. Lindsay, Jr.
[√] Donald R. Maxfield
[√] Linda H. Michael
[√] Milton V. Peterson
[√] E. Guy Ridgely
[√] Glenn W. Saunders
[√] Charles H. Smith, Jr.

[√] Verlin W. Smith
[√] Henry A. Thomas
[√] Stephen G. Yeonas

2. [ ] We find in favor of all defendants.

B. As to Count II (breach of fiduciary duty):

1. We find against the following defendant(s):
[ ] First American Bankshares, Inc.
[ ] Virginia Bankshares, Inc.
[√] Emanuel A. Baker, Jr.
[√] Jack W. Beddow
[√] Harriet F. Bradley
[√] Joel T. Broyhill
[√] Thomas B. Chamberlin
[√] Thomas P. Chisman
[√] Sidney O. Dewberry
[√] Milton L. Drewer, Jr.
[√] Eric W. Erdossy
[√] George W. Johnson
[√] Charles T. Lindsay, Jr.
[√] Donald R. Maxfield
[√] Linda H. Michael
[√] Milton V. Peterson
[√] E. Guy Ridgely
[√] Glenn W. Saunders
[√] Charles H. Smith, Jr.
[√] Verlin W. Smith
[√] Henry A. Thomas
[√] Stephen G. Yeonas

2. [ ] We find in favor of all defendants.

C. If there has been a finding against any one or more of the defendants on either count, we fix the plaintiff's damages at $43,956.00 (18.00 Share).

/s/ [Illegible]
Foreman

September 29, 1988.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Case Number C/A88-299-A

DORIS I. SANDBERG

v.

VIRGINIA BANKSHARES, INC., *et al.*

JUDGMENT IN A CIVIL CASE

☒ Jury Verdict. This action came before the Court for trial by jury. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED that judgment is hereby entered in favor of the plaintiff, Doris I. Sandberg, against the defendants Virginia Bankshares, Inc., First American Bankshares, Inc., Emanuel A. Baker, Jr., Jack W. Beddow, Harriet F. Bradley, Joel T. Broyhill, Thomas B. Chamberlin, Thomas P. Chisman, Sidney O. Dewberry, Milton L. Drewer, Jr., Eric W. Erdossy, George W. Johnson, Charles T. Lindsay, Jr., Donald R. Maxfield, Linda H. Michael, Milton V. Peterson, E. Guy Ridgely, Glenn W. Saunders, Charles H. Smith, Jr., Verlin W. Smith, Henry A. Thomas, and Stephen G. Yeonas, jointly and severally, in the amount of $43,956.00 in accordance with the verdict of the jury.

Date September 29, 1988

DORIS R. CASEY
Clerk

/s/ [Illegible]
By Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

[Title Omitted in Printing]

BRIEF IN SUPPORT OF DEFENDANTS FIRST AMERICAN BANKSHARES, INC. AND VIRGINIA BANKSHARES, INC.'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

* * * *

[4] 1. *The Proxy Statement was Not an Essential Link in the Accomplishment of the Transaction*

Sandberg cannot prove the predicate to the rule of presumptive causation declared in *Mills*, since the proxy solicitation itself was not "an essential link" in the accomplishment of the merger transaction.

As fully disclosed in the proxy statement, FABI through VBI owned 85% of the stock in the Bank, and had expressly indicated the intention to vote its shares in favor of the merger. (Plaintiff's Exhibit T at 2.) The requisite two-thirds shareholder approval under Virginia law was therefore assured, and no additional votes from the other shareholders were required to be solicited or obtained. Accordingly, causation could not legally be presumed under the *Mills* test.

FABI and VBI owned more than sufficient shares to assure ratification of the merger, without putting the matter to the minority stockholders. The proxy solicitation, therefore, was not an "essential link in the *accomplishment* of the transaction". Accordingly, causation cannot be presumed under *Mills*.

2. *Any Presumption of Reliance Has Been Rebutted*

Mills left open an issue presented in this case. The Supreme Court in that case was careful to point out that it "did not decide whether causation could be shown where the management controls a sufficient number of shares to approve the transaction without any votes from the minority." 396 U.S. at 385 n.7.

[5] Courts interpreting this cryptic statements have reached inconsistent results. The Second Circuit has ruled that *Mills* causation can be present even if the minority shareholders' vote is totally unnecessary to approve of the transaction. *Schlick v. Penn Dixie Corp.*, 507 F.2d 374, 382-83 (2d. Cir. 1974), *cert. denied*, 421 U.S. 976 (1975). Other courts have been unprepared to go this far because "[a] strict liability rule would impose liability for fully innocent misstatements. It is too blunt a tool to ferret out the kind of deceptive practices Congress sought to prevent in enacting Section 14(a)." *Shidler v. All-American Life and Financial Corp.*, 775 F.2d 917, 927 (8th Cir. 1985).

This Court has never subscribed to the anomalous position apparently endorsed by *Schlick* that causation is found even though the plaintiff did not rely upon anything in the proxy statement in deciding to vote against a proposed transaction. Such a rule makes no sense, and it particularly makes no sense in this case.

Because plaintiff has *not* met the *Mills* test of causation, judgment n.o.v. should be granted.

Even if plaintiff were entitled to a presumption of causation under *Mills*, that presumption has been rebutted by the uncontroverted fact that she did not rely on the proxy statement, and voted against the transaction.

EXCERPTS FROM TRANSCRIPT OF ARGUMENT ON MOTION FOR JUDGMENT NOV AND FOR NEW TRIAL, OCT. 21, 1988

* * * *

[48] MR. STUMP: I won't say much, Your Honor.

I would like to point out that the directors were confronted with a decision on an offer that was being made. They had their own experience on the board. They had evidence of value before them. They received from an investment banker its evidence. They told us what their mental process was. Your Honor correctly states that they did not step up and say, "I made a decision for an improper motive or in bad faith," but the Court had an opportunity to hear them. It seems to me that it is the Court's obligation, if there is nothing to go to the jury, not to let the jury have the matter. And when we have the opportunity to look at the transcript to determine whether there was something to go to the jury, that is the time to exercise that obligation.

THE COURT: The test, of course, is not what I believe from the evidence but what there was a basis for the jury to believe. I think this jury could have concluded, and probably did, that this was a cut deal from the time it left Mr. Clifford's voice to this so-called independent group, that [49] it came down to the bank, that the bank didn't make, and the directors didn't make any judgment on it. It was rubber-stamped right all the way through.

As I say, I don't necessarily buy that, but I think the jury did. And I think that these omissions, while individually you can pick them apart and say, or—and negligence items—may not have been particularly important, the jury was to take the total mix, it seems to me, and determine that they were, either singly or in the aggregate, matters that if resolved would have made a difference in how a stockholder would have voted. I think that that is what the jury came down with.

There is ample evidence, it seems to me, that there really wasn't any judgment made by these directors. That somebody came back from talking to Mr. Clifford and said $42 was a good deal. And these persons, none of whom really are hard up, probably thought it was a good deal for them. And I think that the jury could have well found there was no judgment made. And, as I say, people are not going to get on the stand and say they made a bad faith business judgment, but I think there was sufficient evidence that these matters, if considered by a reasonable investor, would have made a difference, and that is sufficient to establish materiality.

If you are going to say that they couldn't have made a difference because there wasn't anything these directors [50] done and that under the Virginia statute there can't be any damages as a result of that, I mean, caused by it, because there was no alternative. If the holding company didn't like what this board of directors would do, they would just get a new board of directors. Well, one of the directors said that.

But I think there was sufficient evidence to show that there was a violation on each of the six items set forth under Count I. I think that the jury could well have found that the defendants were negligent, the individual defendants, and I think as controlling parties the corporate defendants could likewise be held jointly and severally liable with the individual defendants.

What went on in the jury's mind, I don't know. But probably they figured that we had 22 millionaires, and we take 43,000 and divide it by that, and that isn't going to cost any of them very much. Now, that is not—I don't know whether that is what they thought or not. But we had—that could have influenced the jury. Whether it did or not, we'll never know. And obviously it is not a good way, or the proper way, or legal way for a jury to react. But we can only go so far in inquiring into the jury's motives.

I think that there was sufficient evidence to submit both of these Counts to the jury.

The inconsistencies in the verdict, assuming that that is any longer a ground for setting a jury verdict aside, [51] when arguably a failure to meet a burden of proof on a particular element of a cause of action, by the prescribed standard, could explain the jury verdict, I don't think is any basis to set this jury verdict aside, or to grant a new trial.

For these reasons the motion for a new trial and for judgment notwithstanding the verdict or in the alternative for a new trial will be denied. I will prepare the order.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 88-1020-A

PAUL H. WEINSTEIN, *et al.*,
Plaintiffs,

v.

FIRST AMERICAN BANKSHARES, INC., *et al.*,
Defendants.

EXCERPTS FROM DOCKET SHEET
IN WEINSTEIN CASE

DATE	PROCEEDINGS
1988	
Aug. 8	COMPLETE CASE FILE tog/cert copy of docket entries & order transferring this case from the Dist. of Columbia to the EDVA—filed js
Sept. 23	TRIAL PROCEEDINGS (J.Bryan) This matter came on for hearing on motions. Appearances of counsel. Defts' First American Bankshares and Va. Bankshares' motion to dismiss amended complaint as to sixteen of the pltfs.—argued and denied. Director defts' motion for partial summary judgment as to Count II—argued and denied. sp
Nov. 4	TRIAL PROCEEDINGS: Judge Bryan. This matter came on for hearing on motions. Counsel appeared. Pltfs.' motion for summary judgment granted. Bank defts. cross motion for summary judgment on Count II argued and granted as to punitive damages.

DATE	PROCEEDINGS
Nov. 15	ORDER in accordance w/Trial Proceedings—ent & filed
Nov. 16	NOTICE of Appeal to USCA of order of 11-15-88 —filed by Dir. Defts
Nov. 16	NOTICE of Appeal to USCA of order of 11-15-88 —filed by Deft First Am Bankshares & VA Bankshares
Nov. 17	NOTICE of Appeal to USCA of order of 11-15-88 —filed by Pltfs
Nov. 18	STIPULATED ORDER that execution of judgment is stayed pending appeal w/posting of supersedeas bond in amt of $3,292,236 w/i 20 days

Supreme Court, U.S.
FILED
JUN 25 1990
JOSEPH F. SPANIOL, JR.
CLERK

(10)

No. 89-1448

In the Supreme Court of the United States

OCTOBER TERM, 1989

VIRGINIA BANKSHARES, INC., ET AL., PETITIONERS,

v.

DORIS I. SANDBERG, ET AL., RESPONDENTS.

FIRST AMERICAN BANKSHARES, INC., ET AL., PETITIONERS,

v.

PAUL H. WEINSTEIN, ET AL., RESPONDENTS.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF FOR THE PETITIONERS

JOHN S. STUMP
McGuire, Woods, Battle & Boothe
8280 Greensboro Drive
Post Office Box 9346
McLean, VA 22102

LEWIS T. BOOKER
Hunton & Williams
707 East Main Street
Post Office Box 1535
Richmond, VA 23212

STEPHEN M. SHAPIRO
Counsel of Record
ANDREW L. FREY
KENNETH S. GELLER
LAWRENCE C. MARSHALL
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 463-2000

Counsel for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether subjective opinions and characterizations used in a proxy statement may violate Section 14(a) of the Securities Exchange Act of 1934 when the proxy statement discloses the underlying material facts needed to enable shareholders to decide for themselves whether to accept the opinions and characterizations or to reject them on grounds of potential conflict of interest or ulterior motivation.

2. Whether a plaintiff may invoke an implied cause of action for damages under Section 14(a) of the Securities Exchange Act of 1934 when the allegedly misleading proxy statement could not possibly have affected the outcome of the proxy vote and the plaintiff has not demonstrated causation in any other way.

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

In addition to the parties named in the caption, the following persons were defendants in the district court and appellants in the court of appeals and are petitioners in this Court:

Emanuel A. Baker, Jr.
Harriet F. Bradley
Thomas B. Chamberlin
Sidney O. Dewberry
Eric W. Erdossy
Charles T. Lindsay, Jr.
Linda H. Michael
E. Guy Ridgely
Charles H. Smith, Jr.
Henry A. Thomas
Jack W. Beddow
Joel T. Broyhill
Thomas P. Chisman
Milton L. Drewer, Jr.
George W. Johnson
Donald R. Maxfield
Milton V. Peterson
Glenn W. Saunders
Verlin W. Smith
Stephen G. Yeonas

In addition to the parties named in the caption, the following persons and corporations were plaintiffs in the district court and appellees in the court of appeals and are respondents in this Court:

Roslyn L. Weinstein
Richard Weinstein
Leonard Weinstein
Gary Plushnick
William B. Docksер
Philip Gross
John P. Kyle
Robert I. Schattner
Dante E. Guazzo
Helene D. Engel
Barbara L. Eller
W. G. Dolvin
Kathryn M. Everhart
Omer L. Hirst
Dorothy Fowler Cooper
Edward S. Loveless
Elizabeth K. Puzak
Said Haddad
Joseph B. Latshaw, Jr.
Claude E. Keener, Sr.
Luther A. Gilliam
William L. Mason
Jane M. Dinunzio
Stephen Hartwell
Ethel J. Reid
Patricia Hooker Bonnes
Kathryn Hooker Spradlin
Eugene Hooker Walter
Rebecca Weybright
Anne Carol Weybright
Robert and Bernice Walter
Stephen W. Hartwell, II
Edwin Lynch
Clarice Brault
Jay Weinstein
Helen Weinstein
Evelyn Bushwick
Carol Plushnick
Laura Lee Cookson
Nancy Gross
Kay Kyle
Helen Mackey Gray
General Harry J. Engel
Joseph M. Eller
Henry P. Deyerle
Cynthia B. Dolvin
Norman T. Henry
Katherine Ann Johnson

Thelma H. Loehler
Michael A. Puzak
Benjamin Weiner
Harold E. Shomo
P. S. Webb Co.
Claude E. Keener, Jr.
Foundation for Middle East Peace
Rudolph A. Dinunzio
Anna C. Hooker
Dorothy V. Tobin
Suzanne Hooker Evans
Joseph Edmund Hooker
Mary Helen Walter
Steven Daniel Weybright
David Hooker Weybright
Nokesville Church of the Brethren
Elizabeth H. Nixon
Anthony Colasanto
Helen M. Lynch

Petitioner First American Bankshares, Inc. is the parent company of petitioner Virginia Bankshares, Inc. Neither company has subsidiaries other than wholly-owned subsidiaries.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT	ii
TABLE OF AUTHORITIES	vii
OPINIONS BELOW	1
JURISDICTION	1
STATEMENT	1
A. The Merger Proposal	2
B. The Bank's Approval of the Merger	5
C. The Proxy Solicitation	8
D. The State Court Litigation	10
E. The Federal Court Litigation	11
F. The Decision of the Court of Appeals	13
SUMMARY OF ARGUMENT	15
ARGUMENT	19
I. PERSONS WHO SOLICIT PROXIES MAY NOT BE HELD LIABLE UNDER FEDERAL PROXY LAW FOR EXPRESSION OF SUBJECTIVE OPINIONS OR USE OF INDEFINITE CHARACTERIZATIONS WHERE THE UNDERLYING MATERIAL FACTS ARE FAIRLY DISCLOSED	19
A. Opinions And Characterizations That On Their Face Are Indefinite And Unverifiable Expressions Cannot Constitute Misstatements Of Material Fact Under Section 14(a)	20

TABLE OF CONTENTS—Continued

Page

B. Even If Some Characterizations Or Opinions Could Support Liability Under Section 14(a), The Expressions In This Case Cannot Because They Were Accompanied By Objective Facts That Enabled Shareholders To Make Their Own Evaluations 29

II. A PLAINTIFF INVOKING AN IMPLIED CAUSE OF ACTION FOR DAMAGES UNDER SECTION 14(a) OF THE SECURITIES EXCHANGE ACT MUST DEMONSTRATE THAT THE ALLEGED PROXY VIOLATION CAUSED THE INJURY THE PLAINTIFF SEEKS TO REDRESS 37

A. Respondents Cannot Establish Causation Because The Outcome Of The Shareholder Vote Could Not Have Been Affected By Any Defect In The Proxy Statement 39

B. Even If Non-Voting Injuries Are Deemed Cognizable Under Section 14(a), Respondents Have Not Proved That The Proxy Statement Caused Them Any Harm 45

CONCLUSION 50

STATUTORY APPENDIX SA-1

TABLE OF AUTHORITIES

CASES:

Page

Alabama Farm Bureau Mutual Casualty Co. v. *American Fidelity Life Ins. Co.*, 606 F.2d 602 (5th Cir. 1979), cert. denied, 449 U.S. 820 (1980) 32, 47

Basic Inc. v. *Levinson*, 485 U.S. 224 (1988) 38, 39

Bastian v. *Petren Resources Corp.*, 892 F.2d 680 (7th Cir.), cert. denied, 58 U.S.L.W. 3769 (1990) 44

Biesenbach v. *Guenther*, 588 F.2d 400 (3d Cir. 1978) 32

Blue Chip Stamps v. *Manor Drug Stores*, 421 U.S. 723 (1975) 23, 38, 45

Board of Trustees v. *Fox*, 109 S. Ct. 3028 (1989) .. 28

Brunswick Corp. v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) 42

Bulgo v. *Munoz*, 853 F.2d 710 (9th Cir. 1988) 21

Business Roundtable v. *SEC*, No. 88-1651 (D.C. Cir. June 12, 1990) 27

Data Probe Acquisition Corp. v. *Datatab, Inc.*, 722 F.2d 1 (2d Cir. 1983), cert. denied, 465 U.S. 1052 (1984) 23

Dirks v. *SEC*, 463 U.S. 646 (1983) 23, 38

Ernst & Ernst v. *Hochfelder*, 425 U.S. 185 (1976) .. 21

Field v. *Trump*, 850 F.2d 938 (2d Cir. 1988), cert. denied, 109 S. Ct. 1122 (1989) 32

Franchard Corp., Securities Act Release No. 4710, [1964-1966 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 77,113 (July 31, 1964) 26

Goldberg v. *Meridor*, 567 F.2d 209 (2d Cir. 1977), cert. denied, 434 U.S. 1069 (1978) 35

Golub v. *PPD Corp.*, 576 F.2d 759 (8th Cir. 1978) .. 32, 35

Gomez v. *United States*, 109 S. Ct. 2237 (1989) 27

Healey v. *Catalyst Recovery of Pennsylvania, Inc.*, 616 F.2d 641 (3d Cir. 1980) 46

J.I. Case Co. v. *Borak*, 377 U.S. 426 (1964) 39, 42

Kademian v. *Ladish Co.*, 792 F.2d 614 (7th Cir. 1986) 31

TABLE OF AUTHORITIES—Continued

	Page
Kas v. *Financial General Bankshares, Inc.*, 796 F.2d 508 (D.C. Cir. 1986)	31, 32, 35
Kidwell ex rel. Penfold v. *Meikle*, 597 F.2d 1273 (9th Cir. 1979)	46
Kohn v. *American Metal Climax, Inc.*, 458 F.2d 255 (3d Cir.), cert. denied, 409 U.S. 874 (1972)	35
Lessler v. *Little*, 857 F.2d 866 (1st Cir. 1988), cert. denied, 109 S. Ct. 1130 (1989)	35
Lowe v. *SEC*, 472 U.S. 181 (1985)	28, 29
Madison Consultants v. *FDIC*, 710 F.2d 57 (2d Cir. 1983)	46, 47
Milkovich v. *Lorain Journal Co.*, No. 89-645 (June 21, 1990)	28
Mills v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970)	14, 37, 39, 40, 46
Mills v. *Esmark, Inc.*, 544 F. Supp. 1275 (N.D. Ill. 1982)	35
Parklane Hosiery Co. v. *Shore*, 439 U.S. 322 (1979)	37
Pinter v. *Dahl*, 486 U.S. 622 (1988)	23
Piper v. *Chris-Craft Industries*, 430 U.S. 1 (1977)	25, 41, 42, 45
Posadas de Puerto Rico Associates v. *Tourism Co.*, 478 U.S. 328 (1986)	28
Presidio Enterprises v. *Warner Bros.*, 784 F.2d 674 (5th Cir. 1986)	20
Radol v. *Thomas*, 534 F. Supp. 1302 (S.D. Ohio 1982), later proceeding 556 F. Supp. 586 (S.D. Ohio 1983), aff'd on other grounds, 772 F.2d 244 (6th Cir. 1985), cert. denied, 477 U.S. 903 (1986)	30, 35
Rondeau v. *Mosinee Paper Corp.*, 422 U.S. 49 (1975)	44, 45
Santa Fe Industries v. *Green*, 430 U.S. 462 (1977)	*passim*
Schlick v. *Penn-Dixie Cement Corp.*, 507 F.2d 374 (2d Cir. 1974), cert. denied, 421 U.S. 976 (1975)	41, 42, 43, 45, 48, 50
SEC v. *Medical Committee for Human Rights*, 404 U.S. 403 (1972)	28

TABLE OF AUTHORITIES—Continued

	Page
SEC v. *National Securities, Inc.*, 393 U.S. 453 (1969)	39
SEC v. *Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968), cert. denied, 394 U.S. 976 (1969)	21
Shearson/American Express Inc. v. *McMahon*, 482 U.S. 220 (1987)	42
Sundstrand Corp. v. *Sun Chemical Corp.*, 553 F.2d 1033 (7th Cir.), cert. denied, 434 U.S. 875 (1977)	42
Swanson v. *American Consumers Industries*, 475 F.2d 516 (7th Cir. 1973)	46
Touche Ross & Co. v. *Redington*, 442 U.S. 560 (1979)	42
TSC Industries v. *Northway, Inc.*, 426 U.S. 438 (1976)	23, 35, 40, 46
Virginia Pharmacy Board v. *Virginia Consumer Council*, 425 U.S. 748 (1976)	28
Ward v. *Succession of Freeman*, 854 F.2d 780 (5th Cir. 1988), cert. denied, 109 S. Ct. 2064 (1989)	21, 32
Wilko v. *Swan*, 346 U.S. 427 (1953)	42

STATUTES AND REGULATIONS:

Securities Exchange Act of 1934, 15 U.S.C. §§ 78a *et seq.*	
Section 10(b), 15 U.S.C. § 78j(b)	39, 43
Section 12(i), 15 U.S.C. § 78*l*(i)	12
Section 14(a), 15 U.S.C. § 78n(a)	*passim*
Section 14(e), 15 U.S.C. § 78n(e)	25
Section 15(b)(4), 15 U.S.C. § 78*o*(b)(4)	44
Section 21(d), 15 U.S.C. § 78u(d)	44
Section 28(a), 15 U.S.C. § 78bb(a)	39
Section 32(a), 15 U.S.C. § 78ff(a)	44
12 C.F.R. § 335.206	12, 15, 20
12 C.F.R. § 335.212	21
17 C.F.R. § 240.14a-3	21
17 C.F.R. § 240.14a-9	20
Va. Code Ann. § 13.1-614	11

TABLE OF AUTHORITIES—Continued

	Page
Va. Code Ann. § 13.1-692.1	12, 27
Va. Code Ann. § 13.1-718E	9
LEGISLATIVE HISTORY:	
H.R. Rep. No. 1383, 73d Cong., 2d Sess. (1934)	40
S. Rep. No. 792, 73d Cong., 2d Sess. (1934)	40
MISCELLANEOUS:	
E. Aranow & H. Einhorn, *Proxy Contests for Corporate Control* (1968)	25
BeVier, *A Comment on Professor Wolfson's 'The First Amendment and the SEC,'* 20 Conn. L. Rev. 325 (1988)	29
Easterbrook & Fischel, *Mandatory Disclosure and the Protection of Investors*, 70 Va. L. Rev. 669 (1984)	24
Easterbrook & Fischel, *Voting in Corporate Law*, 26 J.L. & Econ. 395 (1983)	25
Gelb, *Rule 10b-5 and Santa Fe—Herein of Sue Facts, Shame Facts, and Other Matters*, 87 W. Va. L. Rev. 189 (1985)	41
T. Hazen, *Securities Law* (2d ed. 1990)	43
Herzel & Shepro, *Setting the Boundaries for Disclosure*, 16 Sec. Reg. L.J. 179 (1988)	24
R. Jennings & H. Marsh, *Securities Regulation* (6th ed. 1987)	43, 47
Jorden & Greif, *Federal Securities Fraud and State Law Fiduciary Duties—A Tour of the Circuits Reveals Continuing Confusion*, 19 Idaho L. Rev. 211 (1983)	43
H. Kripke, *The SEC and Corporate Disclosure* (1979)	25
L. Loss, *Fundamentals of Securities Regulation* (2d ed. 1988)	47
Oxford English Dictionary (2d ed. 1989)	34
Prosser and Keeton on Torts (5th ed. 1984)	44

TABLE OF AUTHORITIES—Continued

	Page
Ratner, *"Federal Corporation Law" Before and After Santa Fe Industries v. Green*, in *9th Annual Institute on Securities Regulation* (PLI 1978)	32
Webster's Third New International Dictionary (1971)	22, 34
Wolfson, *The First Amendment and the SEC*, 20 Conn. L. Rev. 265 (1988)	29

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1448

VIRGINIA BANKSHARES, INC., ET AL., PETITIONERS,

v.

DORIS I. SANDBERG, ET AL., RESPONDENTS.

FIRST AMERICAN BANKSHARES, INC., ET AL., PETITIONERS,

v.

PAUL H. WEINSTEIN, ET AL., RESPONDENTS.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 891 F.2d 1112. The district court issued no written opinion in these cases.

JURISDICTION

The court of appeals entered its judgment on December 15, 1989. Pet. App. 4a. The petition for a writ of certiorari was filed on March 15, 1990, and was granted on April 23, 1990. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATEMENT

This litigation grows out of a merger in May 1987 between First American Bank of Virginia ("the Bank")

and petitioner Virginia Bankshares, Inc. ("VBI"), which is a wholly-owned subsidiary of petitioner First American Bankshares, Inc. ("FABI"). Prior to the merger, VBI owned 85% of the Bank's stock. Approximately 2,000 minority shareholders owned the remaining 15% of the shares. As a result of the merger, the Bank became a wholly-owned subsidiary of its parent holding company, and minority shareholders received a cash payment of $42 for each of their shares—nearly $10 more than the highest price at which the shares had traded before the merger was announced.

A. The Merger Proposal.

For some time prior to the merger, Clark M. Clifford, the Chairman of the Board of FABI, had reviewed the possibility of a buyout of minority shares as a means to make the Bank more competitive. As he explained at trial, "[b]anking is a highly competitive business. Your competitors move quickly, and effectively; and you must be able to do so. If you have a minority interest in a bank, then you may not move as expeditiously as you might otherwise move." J.A. 380. Moreover, FABI owned majority interests in other banks that operated in Maryland and the District of Columbia. Consolidating some of these operations promised great efficiencies, but the presence of minority shareholders made consolidation difficult to achieve. J.A. 316 (testimony of Robert A. Altman). The need to achieve these efficiencies was not unique to FABI; "as a general proposition, it is rather unique in United States bank holding company operations for holding companies to have banking subsidiaries where there are minority shareholder interests." J.A. 315 (Altman testimony).[1]

During the second half of 1986, Mr. Clifford, who exercised decisionmaking authority on behalf of FABI (J.A. 382), began to consider whether a merger was feasible and, if so, how much should be offered for the

[1] See also J.A. 185 (testimony of Robert G. Stevens); J.A. 203-204 (testimony of Milton L. Drewer, Jr.).

Bank's minority shares. Clifford testified that he considered a number of factors in anticipating a price in the range of $38 to $40 per share. To begin with, at no time in its history had the Bank's stock ever sold for more than $32.50 per share. See J.A. 523. Although trading in the Bank's stock was not continuous, there had been a considerable number of trades in the three years prior to the merger (764 trades involving 343,108 shares), and all traders had access to detailed financial information disclosed in annual and quarterly financial reports and publicly available bank regulatory filings. Clifford therefore viewed historical and current market prices as a substantial indicator of value. See J.A. 330-334, 382-383. Furthermore, in the spring of 1986 the Bank had offered the minority shareholders the opportunity to purchase additional stock at $30 per share—$2 below the then-prevailing market price—yet fewer than half of the eligible shareholders exercised their rights to purchase the shares. J.A. 335-338, 522. This undersubscribed offering to shareholders served to confirm that the shares were not worth more than their current market price.

To assist it in reaching a decision regarding a fair price to offer for minority shares, FABI engaged the services of a prominent outside investment banking firm, Keefe, Bruyette & Woods, Inc. ("KBW").[2] KBW first examined a variety of factors relating to the financial strength of the Bank, including "the condition of the company"; whether it was "competitive in its market"; and whether its "financial ratios" were "acceptable within the framework of normal performance of a Virginia bank." J.A. 340 (testimony of Michael C. Connor).

[2] One of the directors of FABI explained that "we determined to contact Keefe, Bruyette because they were to our knowledge regarded as the premier banking house that specialized in banking properties." J.A. 304 (Altman testimony). Respondents' expert witness acknowledged that KBW is one of the top ten firms in the country in the field of publishing bank financial data and in "looking at and dealing with banking securities transactions." J.A. 143 (testimony of Daniel T. Krabill).

KBW then looked at the market for the stock and concluded that it "was a valid market. That is to say, that the price level of the stock prior to the offering being made, approximately $32 to $33 a share, did represent a price that took into account all available information that the public would need to establish a price level." J.A. 340. KBW recognized that the Bank's financial statements did not fully reflect some appreciation of the Bank's real estate holdings, but it concluded that these gains were offset by countervailing adjustments such as the Bank's lower loan loss reserves as compared to other banks. J.A. 355-356. KBW also considered the undersubscribed rights offering to be a significant indicator of value (J.A. 341):

> "If there had been a substantial interest in buying stock, it would have been reflected in a complete purchase and requects for more. The fact that it was not successfully subscribed was an indication that in fact the price levels then in the market reasonably reflected the combined view of the market on that price, that it was a fair market at that time, taking into account all information about the company that could be known."

Although KBW concluded that the current market price reflected the true value of the shares, it did not recommend that the merger be proposed at that price level. Rather, as KBW Vice President Michael Connor testified, KBW "looked at the fact that the company wanted to * * * make an offer that was unassailable from a reasonable standpoint. It was clearly a part of our charge from the company to arrive at a price that would be fair." J.A. 341. Hence, KBW suggested that FABI offer $42 per share, "a price that will show those minority shareholders that we are being fair, that we are offering them a substantial premium that isn't technically required but is being offered out of good faith." J.A. 347. KBW concluded that $42 would constitute "convincing evidence of the intent to be fair." J.A. 346. In accordance with this evaluation, KBW issued an opinion letter that, after detailing the terms of its employment

by FABI and the various factors that it took into account in assessing the shares' value, declared that "we are of the opinion that $42 per share represents a fair price for the shares of First American Bank of Virginia not currently owned by [FABI]." Pet. App. 75a-76a.

In light of his original expectation that FABI would offer between $38 and $40 per share, Clifford was surprised by KBW's recommendation that FABI offer $42 per share. But once KBW had suggested that price, he felt obliged to offer that amount. Clifford testified that "after Keefe, Bruyette had recommended the $42, then I could not go to $38 or $40 after they once made the recommendation. I couldn't go to the shareholders and say I was going to pay $40 but the adviser said $42. So that pretty well made up my decision for me." J.A. 384; see also J.A. 309 (Altman testimony) ("[h]aving sought that advice, we thought it was appropriate to accept it"); J.A. 185-186 (Stevens testimony); J.A. 203-204 (Drewer testimony).

To communicate FABI's decision to propose a merger at $42 per share, Clifford set up a meeting with Milton L. Drewer, Jr., Chief Executive Officer of the Bank. When Clifford told Drewer that FABI would offer $42 per share, Drewer was pleased with the offer and commented "that it was possibly some $10 more than the market at the time." J.A. 385 (Clifford testimony); see also J.A. 313 (Altman testimony) (Drewer "indicated that he thought the price was a very good price").

B. The Bank's Approval of the Merger.

On January 15, 1987, FABI's proposal was presented to the Bank's Board of Directors,[3] which instructed the

[3] The Board of Directors comprised 22 members, all of whom were themselves minority shareholders of the Bank's stock (owning 58,249 shares, or 8% of the minority shares). Only one of the directors, Jack Beddow, was affiliated with FABI or VBI, and 15 of the directors had over ten years of continuous service on the Board. Those directors assumed their positions before FABI's current management acquired any shares in the bank. See Pet. App. 47a-50a.

Board's Executive Committee to study the issue and make a recommendation to the Board. The Executive Committee, composed of 11 members of the Board, asked one of the other directors, Joel T. Broyhill, to join them in their deliberations because Broyhill (who owned 31,000 shares) was the largest of the minority shareholders on the Board, and the Committee "wanted to make sure that we have his opinion in with the * * * full discussion that we were having." J.A. 215 (Drewer testimony).

The Executive Committee called upon KBW to present its financial analysis and to respond to questions. J.A. 233 (Drewer testimony). Michael Connor and John Boyle, both Vice Presidents of KBW, made a presentation to the Executive Committee at which they explained their findings and conclusions. The Bank's in-house counsel and chief financial officer attended the meeting, and numerous questions were asked of the KBW representatives. J.A. 234. After the meeting, the Committee requested that KBW send additional information, including copies of charts and exhibits that KBW had used during its presentation. J.A. 219-221, 504-510.

The Executive Committee ultimately decided that FABI's $42 offer was fair and that it was unnecessary for the Bank to retain a second investment banking firm to appraise the value of the shares. J.A. 232-234. These views were transmitted to the Bank's full Board of Directors which, after deliberating on the merits of the offer, agreed with the Executive Committee that the offer was fair and that it was not necessary to hire another appraiser. In the course of the discussions of the Executive Committee and the full Board of Directors, various directors attributed different degrees of importance to factors such as the information presented by KBW,[4] the

[4] "I was quite impressed with the credentials of the firm [KBW], and then when they took the various things into consideration that they had in my mind based on some 30 years of experience of investments of various types, including managing stock portfolios where I am dealing back and forth with stocks, it seemed to me that they have covered it quite adequately. They have compensated for the fact that there was under-valued real estate by the fact that there were also reserves that were under. And I thought it [$42] was a very good figure. In fact I am very comfortable with the figure."

J.A. 371-372 (testimony of Charles Henry Smith, Jr.); see also J.A. 268 (testimony of Stephen G. Yeonas) ("Number one was the Keefe, Bruyette report. Number two, when they came to the meeting, I asked them questions. Other members of the Executive Committee asked them questions. I was satisfied with the answers that they gave").

members' own assessment of the value of the shares,[5] the undersubscribed rights offering at $30 per share,[6] the directors' business judgment that FABI was not likely to increase the offer,[7] and the Board's duty "to take special

[5] "Because I felt we had sufficient detailed information as to how they [KBW] arrived at the value, and we didn't need any further information, we knew the book value. We knew just as well as they did the appreciation of the value, the land. We knew what other bank stock was selling for. * * * I have been a stockholder of this bank for 20-some years and watched the market value of the stock. I had seen the dividends. I had seen the increase in value of the stock. And I felt that based on 22, 24 years that I had been a member of that board, and being an investor myself, I thought that was far more than generous."

J.A. 272-273 (testimony of Joel T. Broyhill); see also J.A. 266 (Yeonas testimony) ("I personally purchased stock in May of the year before at $32.50 a share. So I was making a substantial profit even on that individual purchase").

[6] J.A. 266 (Yeonas testimony) ("in our judgment the price was very fair at $42 a share; and we came to that conclusion for the following reasons: number one, was that the majority of the subscription rights at $30 a share were not purchased"); J.A. 288 (testimony of E. Guy Ridgely) ("A year prior to that time * * * [n]ew capital had to be raised and was offered to the existing stockholders at $30 a share. And here a year later the holding company is offering $42 a share"); J.A. 238 (Drewer testimony) ("it was getting tougher to get people to purchase the stock when we had offerings such as this").

[7] J.A. 218 (Drewer testimony) (the directors discussed whether they thought the "holding company would go any higher than $42"); J.A. 266 (Yeonas testimony) ("I was aware of the experience in Maryland. The holding company had made an offer in Maryland, which was rejected. Then the holding company continued to buy stock from the shareholders at a lower price, and I did not

consideration of the minority stockholders"[8]—particularly those minority shareholders who were anxious to sell their shares at this substantial premium price.[9]

The minutes of the Board's February 12, 1987 meeting declared that the Board unanimously resolved "that the Agreement and Plan of Merger is hereby approved and found to be in the best interests of First American Bank's shareholders and directed to be submitted for consideration by First American Bank's shareholders with the recommendation of the Board of Directors that it be approved by them." J.A. 458, 235.

C. The Proxy Solicitation.

In accordance with Virginia and federal law, a proxy statement, describing the proposed merger and the Board's recommendation, was prepared and sent to each stockholder in preparation for the annual stockholders' meeting. Because FABI owned 85% of the Bank's shares, it had far more than the two-thirds of the votes needed

---

want to see our shareholders in that position"); J.A. 254 (testimony of Emanuel A. Baker, Jr.) ("it was clear in my mind that the holding company was making an offer of $42 cash, and the offer was firm"); J.A. 377 (testimony of George W. Johnson) ("I concluded that there was no room for any additional movement in that offer").

[8] J.A. 231 (Drewer testimony); see also J.A. 378 (Johnson testimony) ("I was primarily concerned with the interests of the minority stockholders"); J.A. 275 (testimony of Sidney O. Dewberry) ("I clearly understood my obligations * * * [t]o see that the stockholder[s] got a fair price for their stock"); J.A. 369 (Smith testimony) ("My interest was for the minority stockholders, of which I was one").

[9] "[O]ur responsibility [was] to be doubly sure that we got a fair price and that we had to take special consideration of the minority stockholders on both sides, one that we get a fair price on the high side, that we could there, but at the same time that we not be overzealous and the deal might fall through and that we might harm the stockholders who felt a real need to sell and thought $42 was—and they just wanted that price."

J.A. 231 (Drewer testimony). See also J.A. 257 (Baker testimony) ("it was an excellent opportunity for the minority stockholders").

to effectuate the merger without consent of any minority shareholders. See Va. Code Ann. § 13.1-718E. Nonetheless, the proxy statement contained 35 pages of detailed information about the merger. Pet. App. 34a-76a.

The proxy statement reported that the merger "has been approved by the Board of Directors because it provides an opportunity for the Bank's public shareholders to achieve a high value for their shares. The price to be paid is about 30% higher than the $32.50 per share at which the Bank's common stock traded on February 8, 1987, the last trading day prior to the announcement of the proposal." Pet. App. 53a-54a. In explaining how the Board had determined that the $42 per share offer was "fair to * * * shareholders," the proxy statement described a variety of objective economic factors that the Board had reviewed. *Id.* at 37a, 53a-54a. The statement also explained that "FABI's Board of Directors commissioned Keefe, Bruyette & Woods, Inc., an independent investment banking firm, to pass on the fairness of the Merger from a financial point of view." *Id.* at 38a. After setting forth KBW's qualifications to evaluate the shares, the proxy statement described in detail the terms of KBW's engagement and the fact that KBW had been engaged by FABI—not by the Bank:

> "For rendering its opinion to FABI, Keefe, Bruyette & Woods, Inc. will be paid $25,000, and if the Merger is consummated, will be paid an additional fee of $75,000. In addition, FABI will reimburse Keefe, Bruyette & Woods, Inc. for all of its reasonable out-of-pocket disbursements and expenses and has extended to Keefe, Bruyette & Woods, Inc. indemnification arrangements usual in such engagements."

Id. at 55a. The full terms of KBW's engagement and compensation also were set forth in KBW's opinion letter, which was attached to the proxy statement. *Id.* at 74a-76a.

To inform minority shareholders of facts that might be deemed relevant in assessing the Board's recommendation on the issue of financial fairness, the proxy state-

ment revealed that the "Bank has had, and expects to have in the future, banking transactions in the ordinary course of its business with directors." Pet. App. 51a. The proxy statement also clearly disclosed—in three separate places—that the "Board of Directors of the Bank as comprised prior to the Effective Date of the Merger will continue to serve as the Board of Directors of the Resulting Bank." *Id.* at 59a; see also *id.* at 55a-56a, 38a.

At the April 21, 1987 meeting of the shareholders, the merger received overwhelming approval by 97% of the shares voted. In addition to FABI's votes, over 70% of the minority shares were voted in favor of the proposal. J.A. 65-66, 249-250.

D. The State Court Litigation.

Not all shareholders were satisfied with the price they would receive under the merger plan. Shortly after the proxy statement was sent out, a group of 15 shareholders, led by respondent Paul H. Weinstein, filed a protest before the Virginia Corporation Commission. In a detailed submission to the Commission, they raised an array of objections to the merger, including allegations that the $42 price was unfair to the minority shareholders and that the Bank's directors had breached their fiduciary duty by recommending the merger. J.A. 29-36. The Commission refused to entertain these claims and approved the merger, finding that because a "benefit to the public's interest may result therefrom and no detriment to the public will ensue, the Commission is of the opinion and finds that granting the required certificates will be in the public interest." J.A. 38-39.

Six days before the scheduled meeting of shareholders, Weinstein and 12 other shareholders filed an action in the Circuit Court of Fairfax County, Virginia, seeking to enjoin the meeting and the merger and also seeking an appraisal remedy. The plaintiffs alleged, *inter alia*, that "[t]he $42 per share that defendants propose to pay complainants * * * is far less than the true value of the

shares." J.A. 9. The complaint, which was based on information set forth in the proxy statement, alleged that the directors engaged in deceptive practices and were subject to a conflict of interest, and accused them of improperly relying on the KBW assessment because they "failed to conduct any independent investigation of the fairness of the proposed Merger and, specifically, failed to retain any independent financial advisor to advise the Directors as to the fairness of the plan." J.A. 10, 6-14.

The Virginia court denied relief, noting that it lacked power to "stop this merger without a showing of fraud." J.A. 21. See Va. Code Ann. § 13.1-614 (barring injunctive relief against corporate meetings and transactions in the absence of fraud). Moreover, the court explained that the Virginia General Assembly "chose to balance the competing interests of minority stockholders versus those of the depositing public" by withholding an appraisal remedy for dissenting shareholders in bank mergers, and ruled that "[c]omplainants may not obtain that which the legislature has taken away by masking their request as the enforcement of an equitable duty." Pet. App. 32a-33a. In light of this decision, which the Virginia Supreme Court later declined to review, the annual meeting proceeded as planned.

E. The Federal Court Litigation.

On March 14, 1988, another shareholder, respondent Doris I. Sandberg, appearing through the same counsel, filed a class action in the United States District Court for the Eastern District of Virginia. Much like the previous state law complaint, the federal complaint alleged breach of fiduciary duty based on the supposed inadequacy of the $42 per share received by the minority shareholders. But this complaint also alleged that FABI, VBI, and the individual directors of the Bank had violated Section 14(a) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78n(a), by issuing a proxy statement that "contained misstatements of material fact and

failed to disclose material facts necessary to make the statements made not misleading." J.A. 49.[10]

The district court refused to certify a class of minority shareholders and also declined to allow a group of plaintiffs, led again by respondent Weinstein, to intervene in the *Sandberg* litigation. The federal claim therefore proceeded to trial as an individual action involving a shareholder who owned 2,442 shares and who claimed that the proxy statement contained six misstatements concerning the merger transaction. Pet. App. 15a-17a. The jury returned a general verdict for respondent Sandberg on the federal count in the amount of $43,956, or $18 per share. On the state law claim of breach of fiduciary duty, the jury found in favor of the two corporate defendants but against the individual Bank directors, assessing damages in the same amount.

While the *Sandberg* litigation was pending, a group of 67 plaintiffs who owned 182,902 shares, led once again by respondent Weinstein and represented by the same counsel, filed a separate action in federal court. After the *Sandberg* verdict was rendered, these plaintiffs moved for summary judgment, asking the court to apply the doctrine of non-mutual offensive collateral estoppel. Over petitioners' objections, the district court applied this doctrine and granted summary judgment for these plaintiffs, awarding them the $18 a share that the jury had awarded respondent Sandberg, for a total of $3.3 million. Pet. App. 28a-29a.[11]

---

[10] Section 14(a) makes it unlawful to solicit a proxy "in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe." Section 12(i) of the Act, 15 U.S.C. § 78*l*(i), empowers the Federal Deposit Insurance Corporation to "administer and enforce" Section 14(a) as applied to proxy solicitations of banks insured and regulated by the FDIC. The antifraud provision promulgated by the FDIC, 12 C.F.R. § 335.206, is set forth in the appendix to this brief.

[11] The court similarly granted summary judgment on the state law claims, but because of Virginia's statutory limit on directors' liability, this alternative award was limited to $2.3 million. See Va. Code Ann. § 13.1-692.1.

F. The Decision of the Court of Appeals.

The Fourth Circuit affirmed the *Sandberg* judgment and the grant of summary judgment in *Weinstein*. It held that two of the six alleged misstatements that had been presented to the jury could support liability under Section 14(a).

The court of appeals first ruled that the proxy statement falsely described the motives and beliefs of the Bank's directors, who had recommended the merger on the ground "that the $42 offer was fair to the minority stockholders" and represented a "high value for their shares." Pet. App. 15a-16a. The court reasoned that this expression of opinion was misleading because it did not reveal the "real" motivations of the directors. *Id.* at 15a. According to the court, "the jury was certainly justified in believing that the directors did not believe a merger at $42 per share was in the minority stockholders' interest but, rather, that they voted as they did for other reasons, *e.g.*, retaining their seats on the board." *Ibid.* The court held that "[w]e cannot say that the directors' recommendation that the $42 offer was fair to the minority stockholders was * * * not a material misrepresentation." *Id.* at 16a.

The court of appeals next ruled that it was deceptive for the proxy statement to characterize KBW as "an independent investment banking firm." Citing the contingent compensation agreement between FABI and KBW and the fact that KBW received its information on the issue of financial fairness from FABI, the court asserted that a representation that KBW made "an independent determination could certainly have been found to be a material misrepresentation." Pet. App. 16a.

The court of appeals also deemed it irrelevant that respondent Sandberg "admitted lack of reliance" on the allegedly misleading proxy statement and that the minority shareholders had no means of blocking the merger. Pet. App. 11a. Under Virginia law, FABI's ownership of 85% of the Bank's shares gave it the right to effect the merger even if every one of the minority share-

holders voted against it.[12] Although the court of appeals recognized that this Court previously left open the question whether causation could ever be established under these circumstances, see *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 385 n.7 (1970), the court proceeded to announce a rule that entirely dispensed with any need to show causation. Pet. App. 12a-14a. The Fourth Circuit declared that "if the proxy statement contained material misrepresentations and was an essential link in the merger, § 14(a) liability may be established" even though the individual plaintiff could not prove "reliance" on the proxy statement and even though "the minority's voting strength is insufficient to halt [the] merger." *Id.* at 14a. The damages caused by the allegedly erroneous statements in the proxy solicitation, the court ultimately concluded, were the difference between the price the minority shareholders actually received ($42 per share) and the price asserted by respondents' expert witness to represent the stock's "inherent value" ($60 per share). *Id.* at 20a.

On respondent Sandberg's cross-appeal, the court of appeals reversed the district court's refusal to certify a class of all minority shareholders. The result of this ruling is that the $43,956 judgment that the jury awarded to respondent Sandberg may be transformed on remand into a judgment in excess of $13 million. Pet. App. 11a.[13]

---

[12] The proxy statement expressly informed shareholders that "the Plan of Merger must be approved by the vote of more than two-thirds of the outstanding Bank common stock entitled to vote. Because Virginia Bankshares owns more than the requisite minimum and has indicated its intention of voting for the Plan of Merger, the Bank's Board of Directors expects the Plan of Merger to be approved." Pet. App. 52a.

[13] The liability of the individual directors on the state law claims is subject to a statutory cap and cannot exceed $2.3 million, no matter how large the class. See note 11, *supra*. Because the directors' liability under the federal count is greater than under the state law count, and because the corporate petitioners were exonerated under the state law count, it is clear that the judgments below cannot be sustained on state law grounds alone.

SUMMARY OF ARGUMENT

I.

Federal regulation of corporate proxy solicitations plays an important role in the Nation's system of corporate governance. By requiring persons who solicit proxies to inform shareholders of material facts relevant to their votes, these laws ensure that shareholders have a fair understanding of issues they are called upon to decide. With the facts in hand, shareholders need not place blind trust in the recommendations of others. Rather, each shareholder has the opportunity to evaluate those recommendations to determine whether they comport with the shareholder's own judgment and individual interest.

Federal regulation of the truthfulness of facts set forth in proxy statements is not, however, a mandate for second-guessing indefinite opinions and characterizations, or for reviewing the subjective motivation of corporate directors. Such opinions and characterizations are, on their face, imprecise expressions of viewpoint that invite shareholders to form their own judgments. If indefinite expressions such as these were subject to review by a jury, the drafters of proxy statements—including both corporate managers and dissident shareholders seeking to solicit proxies—would have little practical guidance as to how to satisfy the law.

There is no statutory or regulatory foundation for imposing liability on such a speculative and indeterminate basis. Nothing in the Securities Exchange Act of 1934 or in any regulation suggests that federal courts and juries are empowered to scrutinize proxy statements to second-guess word choices and expressions of subjective opinion, or to psychoanalyze the motives of those who recommend corporate transactions. To the contrary, the governing FDIC regulation prohibits only misstatements or omissions of "material fact." 12 C.F.R. § 335.206. Not surprisingly, appellate courts applying the antifraud provisions of the federal securities laws repeatedly have

refused to penalize expressions of subjective opinion or use of indefinite characterizations in cases such as this one.

The erroneous construction of federal proxy law adopted by the court of appeals—which permits juries to speculate about motivation and to exercise editorial review over adjectives appearing in proxy statements—threatens to obliterate the boundary line between federal and state jurisdiction in stockholder suits, as defined by this Court in *Santa Fe Industries* v. *Green*, 430 U.S. 462, 478-479 (1977). The court's construction also threatens to impair the quality of disclosure by compelling the drafters of proxy statements to interject exculpatory rhetoric that will distract shareholders and obscure the presentation of material facts. Ultimately, the censorious form of review endorsed by the court below would operate as an obstacle to meaningful communication between managers and shareholders on fundamental issues of corporate policy. Contrary to the purpose of the federal securities laws, corporate debate would be stifled under an oppressive regime of vague legal standards combined with open-ended class-action damages liability.

Even if some indefinite characterizations or opinions could give rise to liability under federal proxy law, this is plainly not such a case. The opinions and characterizations in the proxy statement were completely truthful, given the ordinary, natural meaning of the words "fair" and "independent." Moreover, the proxy statement disclosed all of the objective facts necessary to allow shareholders to assess for themselves whether these adjectives accurately described the directors' recommendation and the status of the investment banking firm. Shareholders who wished to infer the existence of a conflict of interest or ulterior motivation on the part of the directors or KBW were fully equipped to do so. No reasonable shareholder could have been misled by the proxy statement. Significantly, respondents depended on facts disclosed in the proxy statement to establish their claims in state court. They produced no evidence that any shareholder

was in fact misled, and both named plaintiffs admitted that they were *not* misled.

II.

Even if this Court were to conclude that the proxy statement contained misstatements of "material fact," respondents would not be entitled to recover damages unless they also could demonstrate that the alleged misstatements *caused* them cognizable injury. In this case, the jury was never asked to find any causal link. Moreover, it is clear that respondents did not (and could not) satisfy their burden of establishing causation. The court of appeals acknowledged as much when it dispensed with the requirement of proof of causation.

Federal proxy legislation is designed to protect the right of shareholders to influence the outcome of corporate elections by use of their voting power. To recover damages under the proxy law, therefore, a plaintiff must prove injury resulting from interference with shareholder voting. Here, however, respondents could not possibly demonstrate any effect on voting results. Because the majority shareholder owned 85% of the shares —far more than the two-thirds necessary to approve the merger—the merger would have been approved even if every single minority shareholder had voted against it. It was this lack of voting power that precluded respondents from voting down the merger. Nothing contained in the proxy statement affected that result.

This total absence of voting-related injury should be the end of the causation inquiry. But even if the Court were inclined to allow a plaintiff to recover under the proxy law on some other theory of causation, respondents could not qualify for a damages award here. Although some courts have permitted minority shareholders to attempt to prove that, had they known the facts, they could have obtained injunctive relief in state court, the record in this case conclusively shows that respondents failed to stop the merger between FABI and the Bank. Relying on essentially the same factual allegations that underlie the instant action, respondents tried to enjoin the merger

in state court and before the Virginia Corporation Commission on grounds of breach of fiduciary duty, conflict of interest, and deception. But those bodies held that no case was stated for injunctive relief under Virginia law.

By the same token, it would be impossible for respondents to establish causation by asserting that fuller disclosure might have generated adverse publicity and forced the Bank and its 85% shareholder to abandon the merger. That causation theory is inherently conjectural and speculative. In addition, it finds no support in the facts of this case. The merger was authorized by state statute regardless of minority shareholder dissent, and it received regulatory approval notwithstanding vociferous objections from a group of minority shareholders. The merger not only promised to improve the Bank's competitive performance but also offered minority shareholders a 30% premium above the market value of their shares. In these circumstances, any claim that "adverse publicity" would have aborted the merger cannot be taken seriously.

The reason that respondents cannot—and did not even attempt to—demonstrate that they were injured by the proxy statement is that the damages alleged in this case have nothing to do with the proxy solicitation process. Respondents' grievance is over the amount of money they received in the merger, not with the disclosures contained in the proxy statement. Because Virginia law establishes liability limitations that they hope to evade, respondents have sought to replead their state law cause of action as a federal action for securities fraud. But that exercise in artful pleading cannot obscure the fundamental defect in their causation theory: nothing contained in the proxy statement was found or could plausibly have been found to have impaired respondents' ability to halt the merger or to increase the premium paid for their shares.

ARGUMENT

I. PERSONS WHO SOLICIT PROXIES MAY NOT BE HELD LIABLE UNDER FEDERAL PROXY LAW FOR EXPRESSION OF SUBJECTIVE OPINIONS OR USE OF INDEFINITE CHARACTERIZATIONS WHERE THE UNDERLYING MATERIAL FACTS ARE FAIRLY DISCLOSED.

This Court consistently has recognized that the federal securities laws were not designed to federalize the "wide variety of corporate conduct traditionally left to state regulation." *Santa Fe Industries* v. *Green*, 430 U.S. 462, 478 (1977). In corporate merger cases such as this one, the focus of the federal securities laws is on the adequacy of disclosure of material facts; once information is "fairly presented" that would enable shareholders to decide for themselves whether to "accept the price offered" (*id.* at 474), the "fairness of the terms of the transaction" is not a concern of federal law (*id.* at 478).

In this case, the Fourth Circuit ignored these principles and sustained liability that could exceed $13 million based on opinions and characterizations appearing in a proxy statement, even though the proxy statement presented all of the underlying facts necessary for shareholders to form their own judgments about the merger and its financial fairness. In essence, the court of appeals reasoned that the proxy statement was deceptive because the directors did not accuse themselves of breaching their fiduciary duty under state law and did not accuse the investment banker that rendered a fairness opinion of relinquishing its independence. The federal securities laws do not, however, require this kind of self-castigation, or permit a windfall judgment to be predicated on proxy statements that could not possibly have misled any rational investor.

A. Opinions And Characterizations That On Their Face Are Indefinite And Unverifiable Expressions Cannot Constitute Misstatements Of Material Fact Under Section 14(a).

The Fourth Circuit identified two expressions in the proxy statement that, in its view, violated Section 14(a). First, the court held that the statement that the directors recommended the merger as "fair" to minority stockholders was false because "the jury was certainly justified in believing that the directors did not believe a merger at $42 per share was in the minority stockholders' interest but, rather, that they voted as they did for other reasons, *e.g.*, retaining their seats on the board." Pet. App. 15a. Second, the court held that the characterization of KBW as "independent" was false because KBW had discussed the issue of fair price with personnel at FABI and was compensated by FABI on a contingent basis. *Id.* at 16a. The court below plainly erred, however, in predicating Section 14(a) liability on representations in the proxy statement that the merger price was "fair" or that KBW was "independent." It is well established that federal proxy law does not permit juries to second-guess the use of expressions that, on their face, are indefinite and subjective in nature, or to speculate about the motivation of members of a board of directors.

The applicable antifraud regulation of the FDIC prohibits any misstatement of a "material fact" or omission to state a "material fact" necessary to make affirmative representations not false or misleading. See 12 C.F.R. § 335.206; see also 17 C.F.R. § 240.14a-9 (SEC counterpart). This unambiguous focus on *statements of material fact*—as opposed to indeterminate and unverifiable expressions of opinion or subjective motivation—reflects the established rule at common law.[14] These regulations

[14] See, *e.g.*, *Presidio Enterprises* v. *Warner Bros.*, 784 F.2d 674, 678-679 (5th Cir. 1986) ("actions for fraud or misrepresentation must be based on objective statements of fact, not expressions of personal opinion. The law wisely declines to tread in the latter area

should not be given a broader reading than their literal language admits. See *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 197, 201 (1976). The regulations show on their face that they require "nothing more than the disclosure of basic facts so that outsiders may draw upon their own evaluative expertise in reaching their own investment decisions." *SEC* v. *Texas Gulf Sulphur Co.*, 401 F.2d 833, 849 (2d Cir. 1968) (*en banc*).

The detailed schedule of items for disclosure set forth in the FDIC's regulation also refutes any suggestion that it was designed to police the sincerity of expressions of subjective opinion or the use of indefinite adjectives or characterizations. The FDIC regulation lists 22 specific items that proxy statements must reveal. See 12 C.F.R. § 335.212; see also 17 C.F.R. § 240.14a-3 (SEC counterpart). This precisely-calibrated disclosure rule is designed to permit investors to draw their own conclusions about the potential self-interest of directors. For example, item 4 requires a brief description of "any substantial interest, direct or indirect, by security holdings or otherwise" of bank directors making a proxy solicitation. Item 7 requires disclosure of "remuneration" and other transactions between the bank and the directors. Rather than requiring speculation about subjective state of mind or forbidding the use of indeterminate characterizations such as "fair" or "independent," the regulation calls for disclosure of objective factual information. Once that information is fairly set forth, shareholders are free to make their own judgments about matters such as the "fairness" of transactions or the "independence" of corporate advisers.

The conclusion that federal proxy law requires courts to distinguish between "material facts," on the one hand,

because * * * 'everyone is entitled to his own opinion.' * * * A statement of fact is one that (1) admits of being adjudged true or false in a way that (2) admits of empirical verification"); *Bulgo* v. *Munoz*, 853 F.2d 710, 716 (9th Cir. 1988) ("an actionable misrepresentation must relate to fact and cannot be based on an expression of opinion"); *Ward* v. *Succession of Freeman*, 854 F.2d 780, 791 (5th Cir. 1988) ("motive is not a material 'fact' ").

and indefinite, unverifiable "opinions" or "characterizations," on the other, is supported by more than the plain language of the controlling statute and regulation. Crossing the line between objective facts and subjective opinions or characterizations would have multiple adverse effects on the regulation of proxy statements.

1. *Confusion of legal standards.* Disregard of the governing regulation's focus on "material fact" would leave courts, enforcement officials, and businesses seeking to comply with the securities laws in a state of hopeless uncertainty and would lead to unprincipled and unpredictable liability. It is practicable to determine whether an objective fact in a proxy statement is true or false; it is quite another matter, however, to determine the veracity of an indefinite characterization, such as "independent," or a statement of subjective opinion, such as whether the directors truly believed that a merger was "fair." [15]

A "fairness" opinion is dependent upon an assessment of a host of different and necessarily subjective considerations that do not admit of a "correct" answer. Similarly, the question of what subjective factors entered into any individual director's decision to assess a corporate transaction as "fair" (see notes 4-9, *supra*)—much less the decision of an entire board of directors (which here included 22 members)—opens up speculative issues that courts are ill-equipped to resolve.[16] As the

[15] The practical impediment to adjudication of the veracity of indefinite opinions and characterizations such as "fair" and "independent" is shown by examination of the dictionary meaning of those terms. The adjective "fair" has at least 11 accepted definitions, each with its own meaning, and a multitude of subdefinitions, ranging from "moderately * * * large," or "sufficient" to "free from fraud," "equitable," and "having a certain basis in evidence or of reason." *Webster's Third New International Dictionary* 815 (1971). The adjective "independent" has an equally broad and diverse spectrum of meanings. *Id.* at 1148; see pp. 33-34, *infra*.

[16] The speculative nature of this issue is well characterized by respondent Weinstein's deposition testimony (J.A. 61):

court pointed out in *Data Probe Acquisition Corp.* v. *Datatab, Inc.*, 722 F.2d 1, 5 (2d Cir. 1983), a subjective inquiry into director "motivation" erroneously "assumes that boards of directors have monolithic viewpoints." The practical need to avoid such "hazy issues" is "entitled to a good deal of weight" in construing implied causes of action under the antifraud provisions of the federal securities laws. *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 743, 755 (1975). See also *Dirks* v. *SEC*, 463 U.S. 646, 658 n.17 (1983) (rejecting an expansive interpretation of the securities laws that would be "inherently imprecise, [because] imprecision prevents parties from ordering their actions in accord with legal requirements"); *Pinter* v. *Dahl*, 486 U.S. 622, 654 n.29 (1988) (warning against the "risks [of] overdeterring activities related to lawful securities sales" as a result of judicial creation of open-ended legal standards that "produce[] unpredictable results").

2. *Impairment of disclosure statements.* If Section 14(a) liability could be based upon disagreements over unverifiable opinions and characterizations, or speculations about subjective motivation, the statute would require issuers either to forego certain transactions altogether or to fill proxy statements with caveats, qualifications and self-accusations, the practical effect of which would be to make such statements less accurate and virtually incomprehensible to all but the most sophisticated investors. This Court warned in *TSC Industries* v. *Northway, Inc.*, 426 U.S. 438, 448-449 (1976), that the "disclosure policy embodied in the proxy regulations is not without limit." The Court explained that "management's fear of exposing itself to substantial liability" based on unreasonable disclosure rules "may cause it simply to bury the shareholders in an avalanche of trivial information—a result that is hardly conducive to in-

"Q. What evidence do you have that the directors were making their decision based on some other reason, for instance, their own interest?

A. It would all be conjecture."

formed decisionmaking." *Ibid.* This concern applies even more strongly here. The Fourth Circuit has awarded millions of dollars in damages based on speculations about the subjective beliefs of corporate directors and quarrels over the choice of adjectives used in a proxy statement. The drafters of proxy statements have no means to anticipate or avoid such liability. The effect of this open-ended regime of liability will be to severely chill the expression of opinions and use of characterizations in proxy statements, while forcing draftsmen to interlard such documents with exculpatory and wholly unilluminating declarations designed to minimize the danger of ruinous damages awards.

If liability could be predicated on the subjective motivation of individual directors, a prudent draftsman of the proxy statement at issue in this case would have been obliged to interrogate each of the 22 directors of the Bank and examine each as to his or her "true" reasons for approving the merger. Even that daunting task—more appropriate for a psychoanalyst than a corporate lawyer—would provide no immunity from liability, because the Fourth Circuit would permit the jury to make its own determination whether the directors told the truth, or, in fact, held ulterior motivations. Under the Fourth Circuit's rationale, virtually *every* proxy statement would be subject to attack for nondisclosure or inaccurate disclosure of motives, no matter how complete its disclosure of objective, material facts.

Fear of unbounded liability has already produced disclosure documents that are verbose, legalistic, and difficult for the average investor to comprehend. "From the point of view of nonprofessional recipients of disclosure, overwhelming verbosity in prospectuses is still a problem. Even for professionals, the relative significance of important disclosures can be lost in a sea of self-lacerating prose." Herzel & Shepro, *Setting the Boundaries for Disclosure*, 16 Sec. Reg. L.J. 179, 185-186 (1988). See also Easterbrook & Fischel, *Mandatory Disclosure and the*

Protection of Investors, 70 Va. L. Rev. 669, 678-679 & n.16, 708-709 (1984) (referring to "obfuscatory" boilerplate in disclosure documents); accord, H. Kripke, *The SEC and Corporate Disclosure* 268-270, 275, 281-282 (1980). As it has in the past, this Court should reject a radical extension of the scope of implied remedies under the federal securities laws that would generate serious practical burdens and unnecessarily encumber the disclosure process. See, *e.g.*, *Piper* v. *Chris-Craft Industries*, 430 U.S. 1, 40 n.26 (1977) ("[t]he legal uncertainties that inevitably pervade this area of the law call into question whether 'deterrence' of § 14(e) violations is a meaningful goal, except possibly with respect to the most flagrant sort of violations which no reasonable person could consider lawful").[17]

3. *Subversion of federalism principles.* The Fourth Circuit's sweeping decision also erases the boundary-line between state and federal jurisdiction in stockholder disputes and transforms virtually every claim of breach of fiduciary duty in the merger context into a federal securities claim. Through artful pleading, resourceful litigants can now allege that almost any explanation of corporate action is false and misleading because it does not reveal the directors' "real" motivation (Pet. App. 15a), because it does not confess a breach of fiduciary duty in taking action shareholders believe to be wrong, or simply because shareholders disagree with management's stated opinions on economic issues. Under the reasoning of the Fourth Circuit, juries would be empowered to evaluate the subjective motivation of directors and the "fairness"

---

[17] Unpredictable securities law liabilities based on haphazard evaluation of proxy statements would have a deterrent effect on the communications not only of corporate incumbents, but also of insurgents seeking corporate governance reform. See E. Aranow & H. Einhorn, *Proxy Contests for Corporate Control* 12-13, 27, 470-474 (1968) (describing litigation burdens shouldered by insurgents seeking to solicit proxies). See also Easterbrook & Fischel, *Voting in Corporate Law*, 26 J.L. & Econ. 395, 422 (1983) (noting that litigation burdens "increase costs, which in turn decreases the incentive of potential insurgents to engage in proxy fights").

of mergers under the guise of passing on the accuracy of factual disclosures in proxy statements. Similarly, by permitting juries to gauge the degree of independence exercised by investment banking firms, the court has authorized juries to probe the thought processes of financial advisers and to effectively review the performance of fiduciary duty by corporate directors who give weight to the recommendations of such advisers. Thus, the court below has authorized juries in federal proxy cases to make the very determinations called for by state law in suits seeking damages for breach of fiduciary duty or an appraisal.[18]

This Court's decision in *Santa Fe Industries* v. *Green*, 430 U.S. 462, 478-479 (1977), forecloses recognition of an implied cause of action that overrides the traditional boundary line between state and federal jurisdiction. In *Santa Fe*, the Court refused to expand the scope of the securities laws to embrace the fairness of a "freeze-out merger," noting that "[t]he result would be to bring within the Rule a wide variety of corporate conduct traditionally left to state regulation. In addition to posing a 'danger of vexatious litigation which could result from a widely expanded class of plaintiffs' * * * this extension of the federal securities laws would overlap and quite possibly interfere with state corporate law." *Ibid.* The Court reiterated that "we are reluctant to federalize the substantial portion of the law of corporations that deals

[18] The SEC warned against that result in *Franchard Corp.*, Securities Act Release No. 4710, [1964-1966 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 77,113, at 82,046-82,048 (July 31, 1964): "To generally require information in Securities Act prospectuses as to whether directors have performed their duties in accordance with the standards of responsibility required of them under state law would stretch disclosure beyond the limitations contemplated by the statutory scheme and necessitated by considerations of administrative practicality. * * * * In our view, this is a function which the disclosure requirements of the Securities Act cannot effectively discharge. It would either result in self-serving generalities of little value to investors or grave uncertainties both on the part of those who must enforce and those who must comply with that Act."

with transactions in securities, particularly where established state policies of corporate regulation would be overridden." *Ibid.* Accord, *Business Roundtable* v. *SEC*, No. 88-1651 (D.C. Cir. June 12, 1990), slip op. 8-11 (discussing legislative history demonstrating that the proxy laws were never intended "to interfere in the management of corporations").

This case provides a concrete example of how a sweeping extension of Section 14(a) can undermine and subvert state corporation law. Concerned about the adverse effects of unlimited directors' liability, Virginia amended its corporation laws in 1987 to place a cap on directors' civil liabilities. See Va. Code Ann. § 13.1-692.1. Under the terms of Virginia's statute, if a director were to breach a fiduciary duty, his liability cannot exceed the greater of $100,000 or his annual compensation from the corporation. Even though the Fourth Circuit recognized that this damages cap applies precisely to the case at hand (Pet. App. 23a), it overrode the damages limitation by expansion of the implied remedy under the federal securities laws. At the same time, by awarding all minority shareholders what it deemed to be the "inherent value" of their shares in this class action proceeding (*id.* at 20a), the court effectively granted the appraisal remedy that Virginia has deliberately withheld as a matter of state banking policy. See also ACCA Amicus Br. (describing director liability restrictions in 37 states). It is difficult to conceive of a more intrusive "interference" with state corporation law.

4. *Harm to freedom of speech.* The Fourth Circuit's draconian ruling, imposing liability under Section 14(a) based on subjective opinions and characterizations in a proxy statement, needlessly generates tension between the securities laws and the First Amendment. As this Court has frequently noted, "[i]t is our settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question." *Gomez* v. *United States*, 109 S. Ct. 2237, 2241 (1989). Constitutional concerns

can easily be avoided here by limiting Section 14(a) liability to false or misleading statements of material *fact*.

Even in the commercial speech area, government restrictions on communication "may be no more broad or no more expansive than 'necessary' to serve [the government's] substantial interests" (*Board of Trustees* v. *Fox*, 109 S. Ct. 3028, 3032 (1989)) because "the free flow of commercial information is * * * indispensable to the proper allocation of resources." *Virginia Pharmacy Board* v. *Virginia Consumer Council*, 425 U.S. 748, 765 (1976). But communications through proxy statements are not mere commercial speech. They do "more than propose a commercial transaction." *Posadas de Puerto Rico Associates* v. *Tourism Co.*, 478 U.S. 328, 340 (1986). Proxy solicitations are the means by which managers and shareholders communicate with each other in order to chart the future course of their companies and to debate important issues of corporate governance. Thus, proxy statements can be as "political" as debate over divestiture of assets in South Africa or the election of a board of directors. See *SEC* v. *Medical Committee for Human Rights*, 404 U.S. 403 (1972); see also Pet. App. 45a-50a.

In this process, it is essential that participants have reasonable latitude to express opinions and utilize their own choice of words without unpredictable and censorious editorial review. See *Milkovich* v. *Lorain Journal Co.*, No. 89-645 (June 21, 1990), slip op. 19 (distinguishing, for First Amendment purposes, between statements that are "sufficiently factual to be susceptible of being proved true or false" on the basis of "objective evidence," and mere "subjective assertion"). Unless subjective opinions and characterizations are left to the discretion of each speaker, corporate debate—and corporate democracy—will be stifled.

This Court recognized in *Lowe* v. *SEC*, 472 U.S. 181 (1985), that the federal securities laws should be construed in light of First Amendment principles. The Court

observed that "because we have squarely held that the expression of opinion about a commercial product * * * is protected by the First Amendment * * * it is difficult to see why the expression of an opinion about a marketable security should not also be protected." *Id.* at 210 n.58. In a concurring opinion, Justice White, joined by Justice Rehnquist and Chief Justice Burger, stressed that the First Amendment forbids "drastic" remedies that obstruct legitimate communication. *Id.* at 234-235. Although the imposition of a multi-million dollar damages award is not a prior restraint on speech, as considered in *Lowe*, the chilling effect of unleashing such private remedies without ascertainable standards or limitations will, as a practical matter, exert an even more drastic impact on corporate communications.

Knowledgeable commentators have demonstrated that unduly expansive constructions of the federal proxy rules threaten fundamental First Amendment freedoms.[19] Those concerns apply directly here and provide additional reason to overturn the massive damages award that the Fourth Circuit has predicated on the expression of subjective opinion and the use of an indefinite characterization in the proxy statement now before the Court.

B. Even If Some Characterizations Or Opinions Could Support Liability Under Section 14(a), The Expressions In This Case Cannot Because They Were Accompanied By Objective Facts That Enabled Shareholders To Make Their Own Evaluations.

We have explained above that the language and purpose of the federal securities laws would be perverted if liability could be imposed under Section 14(a) based not

---

[19] See, *e.g.*, Wolfson, *The First Amendment and the SEC*, 20 Conn. L. Rev. 265, 283 (1988) ("shareholders and management should enjoy the strong version of first amendment protection in their speech dealing with the governance of that significant element in American life"); BeVier, *A Comment on Professor Wolfson's "The First Amendment and the SEC,"* *id.* at 325, 345 ("The Commission's regulation of proxy solicitations may be the most vulnerable to constitutional challenge").

upon misstatements of material fact but upon disagreements with opinions and characterizations appearing in proxy statements. But even if *some* opinions or characterizations might warrant a finding that Section 14(a) has been violated, it would be impossible to reach that conclusion on the facts of this case. In both instances identified by the court of appeals, the proxy statement fully and fairly set forth the basis for the directors' opinions and characterizations. Once the material *facts* on which opinions and characterizations are predicated have been disclosed, "shareholders will presumably decide for themselves what weight to accord the opinions." *Radol* v. *Thomas*, 534 F. Supp. 1302, 1316 (S.D. Ohio 1982).

1. *The "fairness" of the merger.* The Fourth Circuit determined that it was false and misleading for the directors to recommend the merger on the ground that the buyout price was "fair" and offered a "high value" for minority shares, reasoning that the directors may have "voted as they did for other reasons, *e.g.*, retaining their seats on the board." Pet. App. 15a-16a. But no shareholder could possibly have been misled by the directors' opinion on the issue of financial fairness. The proxy statement set forth specifically what the directors meant when they said the price was "high" and "fair," referring to the fact that the "price to be paid is about 30% higher than the $32.50 per share at which the Bank's common stock traded on * * * the last trading day prior to announcement of the proposal," and that the price "represents a premium of approximately 26% over the book value of the common stock at such date." *Id.* at 53a-54a. Fairness is in the eye of the beholder, and shareholders were free to agree or disagree about the sufficiency of the merger price based on their view of the adequacy of this premium.

Similarly, shareholders received explicit information that permitted them to draw their own conclusions as to whether the directors labored under a conflict of interest in rendering their opinion on financial fairness. The proxy statement disclosed that the directors also were

customers of the Bank and that they expected to continue to transact business with the Bank. In addition, the statement disclosed not once—*but three separate times*—that the directors would retain their seats on the board of directors under the merger plan. Pet. App. 38a, 55a-56a, 59a ("[a]fter the Effective Date of the Merger, the Board of Directors of the Resulting Bank will consist of the members of the Board of Directors of the Bank immediately preceding the Effective Date of the Merger"). Shareholders who wished to discount the directors' opinion because the directors may have desired to "retain[] their seats on the board" were therefore fully able to do so.

The Fourth Circuit never questioned the accuracy of these factual disclosures. Rather, it concluded that Section 14(a) was violated because the directors may secretly have harbored a different and purely selfish motive for stating that the merger was "fair" and because they failed to accuse themselves of that misconduct in the proxy statement. The courts are in agreement, however, that a plaintiff's allegation of a "failure to disclose * * * the 'true' motivations of the directors * * * states no cause of action under the 1934 Act." *Kas* v. *Financial General Bankshares, Inc.*, 796 F.2d 508, 513 (D.C. Cir. 1986). Federal securities laws are "not concerned that [defendants] made a statement that, if the plaintiffs were correct, was misleading since it was not the *true* reason management opposed the tender offer." *Kademian* v. *Ladish Co.*, 792 F.2d 614, 624 (7th Cir. 1986).[20]

---

[20] It would be particularly unfair to impose liability on such a conjectural basis in this case, where some of the directors were foreclosed from testifying (J.A. 375). Even with respect to those directors who did testify, the speculative nature of the inference indulged by the court of appeals is manifest. For example, George W. Johnson, a Bank director who is also President of George Mason University, testified simply that he learned of FABI's interest in the merger, that his decision was addressed to "the interests of the stockholders," and that he relied on the KBW presentation as well as the book value and market value of the stock in deciding that $42 was a fair price. J.A. 278-281. Yet Johnson, along with

Other circuits that have considered the issue have reached the identical conclusion. See, *e.g.*, *Biesenbach* v. *Guenther*, 588 F.2d 400, 401-402 (3d Cir. 1978) (there is no liability for an allegedly false statement that proposed transactions "were in the best interests of the shareholders and were designed to protect shareholders' financial interests"); *Field* v. *Trump*, 850 F.2d 938, 947 (2d Cir. 1988) (rejecting "[e]fforts to dress up [state-law claims] in a § 14(a) suit of clothes * * * [by] including allegations of * * * failure to disclose an alleged ulterior motive"); *Kas*, 796 F.2d at 513-515 ("federal securities laws do not impose any requirement that officers and directors or courts engage in public psychoanalysis about the real motives of corporate officers and directors for reaching a decision"); *Ward* v. *Succession of Freeman*, 854 F.2d 780, 791 (5th Cir. 1988) (securities "[c]ase law clearly holds that a defendant's motive is not a material fact"); *Golub* v. *PPD Corp.*, 576 F.2d 759, 765 (8th Cir. 1978) (federal law does not entitle shareholders to disclosure of the alleged "true motivation of * * * management in selling the assets of the company"); *Alabama Farm Bureau Mutual Casualty Co.* v. *American Fidelity Life Ins. Co.*, 606 F.2d 602, 610 (5th Cir. 1979) (there is no duty to disclose an "individual's motives or subjective beliefs").

The Third Circuit has summarized these precedents in the following terms, which are fully applicable to the case at bar: "The securities laws, while their central insistence is upon disclosure, were never intended to attempt any such measures of psychoanalysis or reported self-analysis." *Biesenbach*, 588 F.2d at 402. See also Ratner, *"Federal Corporation Law" Before and After Santa Fe Industries v. Green*, in *9th Annual Institute on Securities Regulation* 305, 322 (PLI 1978) ("It is not necessary to say, 'This is a grossly unfair transac-

---

the other members of the board, including attorneys, businessmen, a housewife and an ex-Congressman, have all been held liable for large amounts of damages and branded as securities law violators based on naked speculation about their subjective state of mind.

tion in which the board of directors is overreaching the minority shareholders.' You just have to give them the facts"). The proxy statement in this case unquestionably set forth the objective material facts necessary to evaluate the directors' fairness opinion.

2. *The description of the financial adviser as "independent."* Much the same errors infect the Fourth Circuit's holding that the proxy statement misrepresented the status of KBW. To begin with, the court of appeals simply misconstrued the proxy statement in stating (Pet. App. 16a) that petitioners represented that KBW had made an "independent determination" of the fairness of the merger. Quite plainly, the proxy statement did *not* represent that KBW had made such an "independent determination" or that its $42 valuation was "the product of a completely independent analysis." *Ibid.* To the contrary, the proxy statement made crystal clear that KBW was retained *by FABI*, that it rendered its valuation *on the basis of information provided by FABI*, and that KBW *"did not attempt to verify independently any such information."* *Id.* at 54a, 75a (emphasis added). It is hard to imagine how the proxy statement could have been any more candid or explicit about the matter that the court below found to have been misrepresented.

What the proxy statement *did* say was that KBW is an "independent investment banking firm." Pet. App. 38a. But that characterization cannot form the basis for Section 14(a) liability both because it is an undeniably accurate description of KBW, as the word "independent" is commonly used, and because all of the facts that underlay the characterization of "independence" (or might have caused shareholders to question it) were fully and fairly disclosed in the proxy statement.

The first and foremost dictionary definition of the word "independent" precisely supports the usage in the proxy statement:

> "independent. 1. a. Not depending on the authority of another, not in a position of subordination or sub-

jection; not subject to external control or rule; self-governing, autonomous, free."

7 *Oxford English Dictionary* 848 (2d ed. 1989). See also *Webster's Third New International Dictionary* 1148 (1971), which defines "independent" as "1: not dependent: as a(1): not subject to control by others: not subordinate. * * * (2): not affiliated with or integrated into a larger controlling unit (as a business unit) * * * or made by individuals from outside a given unit." It is undisputed that KBW is an unaffiliated, outside, self-governing, and autonomous investment banking firm.

Respondents' contention that the proxy statement falsely characterized KBW as "independent" is based on another definition of the word "independent," one that focuses on KBW's freedom from the influence of others. We doubt that the word "independent" would have been misleading to the Bank's shareholders even if understood in that fashion. But the critical point is that respondents' preferred definition is not the *only* definition of the word; it is not even the primary or most natural definition. It is inconceivable that Congress intended to allow shareholders to impose massive damages liability under Section 14(a) on the ground that a proxy statement was false (indeed, fraudulent) by picking out one definition in the dictionary, when the language used was perfectly accurate under another commonly-accepted definition. Under that regime, drafters of proxy statements could never be certain that they would not be sued by imaginative shareholders armed with unabridged dictionaries.

In any event, even if that course were permissible, here again the proxy statement conspicuously and repeatedly disclosed the facts that respondents relied on to suggest a want of independence. It plainly set forth the contingent nature of the compensation agreement, which was standard in the industry (J.A. 143-144, 353): "For rendering its opinion to FABI, Keefe, Bruyette & Woods, Inc. will be paid $25,000, and if the Merger is consummated, will be paid an additional fee of $75,000" (Pet. App. 55a). The proxy statement also repeatedly stated—in four separate places—that KBW had been retained

and compensated by FABI, and not by the Bank. *Id.* at 38a, 54a, 55a, 74a (disclosing that "FABI's Board of Directors commissioned Keefe, Bruyette & Woods, Inc."). Beyond this, the proxy statement made clear that KBW obtained information relating to the issue of financial fairness directly from FABI, and twice recited that "Keefe, Bruyette & Woods, Inc. did not attempt to verify independently any such information." *Id.* at 54a, 75a. In disregarding these disclosures, the court below inexplicably failed to consider the "total mix" of information made available to investors. *TSC Industries*, 426 U.S. at 449.

Once the relevant facts of the relationship between FABI and KBW were fairly disclosed, shareholders had "no grounds under the 1934 Act for complaining about management's choice of words" in describing them. *Lessler* v. *Little*, 857 F.2d 866, 875-876 (1st Cir. 1988). See also *Golub*, 576 F.2d at 765 (plaintiffs had no right to have the proxy statement characterize the transaction "as plaintiffs would have it characterized"); *Kas*, 796 F.2d at 517 (a proxy statement "need not label or editorialize on the disclosed facts"); *Goldberg* v. *Meridor*, 567 F.2d 209, 218 n.8 (2d Cir. 1977) (Friendly, J.) (it is not deceptive for a proxy statement to fail to characterize disclosed facts with "pejorative nouns or adjectives"); *Kohn* v. *American Metal Climax, Inc.*, 458 F.2d 255, 267 (3d Cir. 1972) ("[r]easonable latitude is important if nit-picking is not to become the name of the game"). In line with these principles, federal courts have recognized that it is not deceptive to use the adjective "independent" when shareholders are given sufficient facts to evaluate that characterization. See, *e.g.*, *Mills* v. *Esmark, Inc.*, 544 F. Supp. 1275, 1295 (N.D. Ill. 1982) (it is "well established that representations concerning the purported independence of a corporate committee are not generally actionable under the securities laws"); *Radol* v. *Thomas*, 534 F. Supp. at 1315 (rejecting a claim that it was improper to describe an investment banking firm as "independent"). The same result follows here.

This Court need not rely on its own reading of the proxy statement to determine whether the words "fair" or "independent" were capable of misleading a reasonable investor, given the substantial disclosures elsewhere in the proxy statement. Respondents produced *no* evidence at trial that the alleged misrepresentations actually misled any shareholder of the Bank. Indeed, perhaps the clearest possible demonstration that the proxy statement was not deceptive came from the mouths of the two named plaintiffs in this litigation, who testified that, immediately upon reading the proxy statement, they concluded that (at least in their view) the buyout price was not "fair" and that the investment banker was not "independent." In the words of respondent Sandberg (J.A. 118):

> "Q. And what did that [proxy] statement mean to you at that time?
>
> A. Well, it meant to me that they were approving this as being a high value.
>
> Q. Did you agree that it was a high value?
>
> A. No, I did not agree."

Similarly, respondent Weinstein testified in deposition that the proxy statement alerted him to the relationship between FABI and the investment banker and provoked his immediate objection to what he perceived to be a lack of independence (J.A. 58):

> "Q. Excuse me, was that apparent to you after reading the proxy statement?
>
> A. Sure. That Keefe, Bruyette was retained by the holding company. They were not independent.
>
> Q. Excuse me. What do you mean they weren't independent?
>
> A. They were operating at the direction of the holding company. The holding company retained Keefe, Bruyette and they were paying them.
>
> Q. Okay. So that was obvious from the proxy statement?
>
> A. Sure. It was also obvious from the proxy statement it was highly unusual to me that this appraisal of Keefe, Bruyette would be on a contingency basis * * *.

> Q. Did you check and see whether that was traditional in the investment banking world?
>
> A. No, I did not. The Keefe, Bruyette letter makes it quite clear that they did not verify a lot of the information that they received from the holding company."

Based on these perceptions, *garnered from the proxy statement itself*, respondents immediately filed protests with the Virginia Corporation Commission and also filed suit in state court complaining of the inadequacy of the merger price, conflict of interest, and the alleged lack of independence of the investment banker. See pp. 10-11, *supra*. In this context, it is sheer sophistry to say that the proxy statement was "misleading" to shareholders. Far from being misled by the proxy statement, respondents were galvanized into action by it and filed state court litigation alleging breach of fiduciary duty and inadequacy of the merger price.

II. A PLAINTIFF INVOKING AN IMPLIED CAUSE OF ACTION FOR DAMAGES UNDER SECTION 14(a) OF THE SECURITIES EXCHANGE ACT MUST DEMONSTRATE THAT THE ALLEGED PROXY VIOLATION CAUSED THE INJURY THE PLAINTIFF SEEKS TO REDRESS.

In addressing implied causes of action under Section 14(a), this Court repeatedly has stated that the plaintiff bears the burden of proving that the alleged wrong *caused* the damages sought to be recovered. As the Court explained in *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 325 n.2 (1979): "A private plaintiff in an action under the proxy rules is not entitled to relief simply by demonstrating that the proxy solicitation was materially false and misleading. The plaintiff must also show that he was injured and prove damages." Stated otherwise, "damages should be recoverable only to the extent that they can be shown." *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 389 (1970).

The causation requirement has played a central role in this Court's decisions construing implied rights of ac-

tion under the federal securities laws. For example, in *Santa Fe*, 430 U.S. at 474 n.14, the Court rejected a claim of fraudulent non-disclosure in a corporate freeze-out merger, where the minority shareholders complained of failure to advise them in advance of the merger plan. The Court held that the alleged non-disclosure was not actionable because "under Delaware law [plaintiffs] could not have enjoined the merger" and because the plaintiffs "do not indicate how they might have acted differently had they had prior notice of the merger." Similarly, in *Blue Chip Stamps*, 421 U.S. at 746, the Court declined to grant standing to sue to a category of plaintiffs seeking damages pursuant to an implied cause of action, relying heavily on the speculative nature of their claim of causation: "The very real risk in permitting those in [plaintiffs'] position to sue under Rule 10b-5 is that the door will be open to recovery of substantial damages on the part of one who offers only his own testimony to prove * * * that the representations contained in [the disclosure document] damaged him." See also *Dirks*, 463 U.S. at 667 n.27 (declining to give weight to claims of "shareholder 'losses,' 'injury,' and 'damages'" where there was "no clear causal connection between inside trading and outsiders' losses"); *Basic Inc.* v. *Levinson*, 485 U.S. 224, 248 (1988) ("[a]ny showing that severs the link between the alleged misrepresentation and * * * the price received * * * by the plaintiff" is sufficient to break "the causal connection").

In this case, by contrast, the Fourth Circuit dispensed entirely with proof of causation. The court of appeals held that millions of dollars in damages may be recovered under Section 14(a) if the proxy statement "contained material misrepresentations and was an essential link in the merger" (Pet. App. 14a), even though the court acknowledged that the combined vote of the minority shareholders could not have affected the course of the merger transaction (*id.* at 13a-14a) and even though the minority shareholders, armed with allegations of breach of fiduciary duty and deception, attempted—but

failed—to block the merger or secure an appraisal remedy in state court (*id.* at 31a-33a).

This unprecedented holding nullifies Congress's declared policy that recovery in securities cases be limited to "actual damages on account of the act complained of" —*i.e.*, damages caused by the alleged infraction of federal proxy law. 15 U.S.C. § 78bb(a). "[A]ny extension of these laws, to approach something closer to an investor insurance scheme, should come from Congress, and not from the courts." *Basic*, 485 U.S. at 256-257 (White and O'Connor, JJ., concurring in part and dissenting in part).

A. Respondents Cannot Establish Causation Because The Outcome Of The Shareholder Vote Could Not Have Been Affected By Any Defect In The Proxy Statement.

In *Mills*, this Court left open the question whether causation in a Section 14(a) case "could be shown where the management controls a sufficient number of shares to approve the transaction without any votes from the minority." 396 U.S. at 385 n.7. We submit that this question admits of only one reasonable answer. The private cause of action for damages under Section 14(a) is designed to remedy injuries caused by distortion of the voting process; it should not be extended to encompass extraneous injuries that are unrelated to voting results.

As this Court has made clear, the purpose of Section 14(a) is "to prevent management or others *from obtaining authorization* for corporate action by means of deceptive or inadequate disclosure in proxy solicitation." *J.I. Case Co.* v. *Borak*, 377 U.S. 426, 431 (1964) (emphasis added). Unlike the general antifraud provisions contained in the federal securities laws, such as Section 10(b) of the Securities Exchange Act, the scope of Section 14(a) is narrow and precisely drawn.[21] It is de-

[21] See *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 468 (1969) ("the existence or nonexistence of regulation under § 14 would not affect the scope of § 10(b) and Rule 10b-5. The two sections of the Act apply to different sets of situations").

signed to ensure that issuers of proxy statements do not abridge the right of shareholders to influence the outcome of corporate elections by casting their votes.[22]

Of course, it is often difficult to prove whether a defective proxy statement actually influenced enough votes to affect the outcome of the shareholders' vote. Hence, this Court in *Mills* announced a presumption to be employed in typical cases: if a shareholder can show that a proxy statement contained a misstatement or omission of material fact it will be presumed that the misstatement or omission affected the outcome of the vote. See *Mills*, 396 U.S. at 384-385. This approach is quite logical, inasmuch as the concept of materiality in such cases is itself defined by reference to what a reasonable shareholder would deem important in deciding how to vote. See *TSC Industries*, 426 U.S. at 449; *Mills*, 396 U.S. at 384.

When the Court declared these principles, however, it recognized that there is a common situation in which the logic of this presumption cannot be applied. When "management controls a sufficient number of shares to approve the transaction without any votes from the minority," *Mills*, 396 U.S. at 385 n.7, it is impossible to presume that even a material misrepresentation in a proxy statement could have caused damage to the voting interests of shareholders. To the contrary, in that situation it is

---

[22] Writing for the Court in *Mills*, Justice Harlan explained (396 U.S. at 381):

> "As we stressed in *Borak*, § 14(a) stemmed from a congressional belief that '[f]air corporate suffrage is an important right that should attach to every equity security bought on a public exchange.' H.R. Rep. No. 1383, 73d Cong., 2d Sess., 13. The provision was intended to promote 'the free exercise of the voting rights of stockholders' * * *. *Id.*, at 14; S. Rep. No. 792, 73d Cong., 2d Sess., 12; see 377 U.S., at 431."

Congress intended that proxy statements would fairly inform shareholders "as to the major questions of policy, which are decided at stockholders' meetings. Too often proxies are solicited without explanation to the stockholder of the real nature of the questions for which authority to cast his vote is sought." S. Rep. No. 792, 73d Cong., 2d Sess. 12 (1934).

certain that the outcome of the vote could *not* have been affected by anything contained in the proxy statement.

In ruling that the element of causation was satisfied notwithstanding the minority shareholders' inability to influence the result of the vote (Pet. App. 13a-14a), the court of appeals purported to follow *Schlick* v. *Penn-Dixie Cement Corp.*, 507 F.2d 374, 382-383 (2d Cir. 1974). In *Schlick* the Second Circuit suggested that even when the proxy statement could have had no impact on the outcome of the vote, the minority shareholders should be allowed to demonstrate that the misrepresentations in the proxy statement caused them injury in some other way. For example, it may be possible for them to show that an accurate proxy statement would have provided information necessary to enjoin the transaction in state court (so-called "sue facts"). Or the plaintiffs may be able to prove somehow that the true facts were so embarrassing that management would have chosen to forego the transaction rather than "hang its dirty linen out on the line" by issuing an accurate proxy statement (so-called "shame facts"). *Schlick*, 507 F.2d at 384; see Gelb, *Rule 10b-5 and Santa Fe—Herein of Sue Facts, Shame Facts, and Other Matters*, 87 W. Va. L. Rev. 189 (1985).

The *Schlick* approach to causation is inconsistent with the purposes of Section 14(a) and serves to allow plaintiffs to recover damages that are absolutely unrelated to the purported violation of federal proxy law. As noted above, the avowed purpose of Section 14(a) is to protect the voting process—not to create an adjunct discovery system to facilitate lawsuits in state court. If a shareholder's interest in influencing the corporate election has not been impaired, he has not suffered a Section 14(a) injury and is not entitled to collect damages under that provision.

In *Piper* v. *Chris-Craft Industries*, 430 U.S. at 26-41, this Court stressed the need to identify the precise interests Congress sought to protect in order to determine how broadly courts should extend an implied

cause of action for damages under the securities laws. Because the focus of the Williams Act was the protection of investors confronted with tender offers, and not the protection of unsuccessful tender offerors who might be injured by Section 14(e) violations, the Court held in *Piper* that recognizing a private damages action for tender offerors was not "necessary to effectuate Congress' goals." *Id.* at 26. So, too, with respect to Section 14(a): Congress's interest was protecting shareholders' votes, and damages actions for injuries unrelated to those votes are unrelated to the goals of Section 14(a). Certainly, it cannot be said that extending Section 14(a) to non-voting injuries is "necessary to effectuate Congress' goals." *Piper*, 430 U.S. at 26; *Santa Fe*, 430 U.S. at 477-480; *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 578 (1979).[23]

When the Second Circuit adopted its contrary position in *Schlick* in 1974, this Court had not yet begun to stress the federalism and separation of powers concerns implicated by expansive judicial creation of implied causes of action for damages under the federal securities laws.[24] In *Santa Fe*, for example, this Court roundly

[23] To paraphrase from the approach this Court has taken in addressing antitrust injuries:

> "Plaintiffs must prove [proxy law] injury, which is to say injury of the type the [proxy] laws were intended to prevent and that flows from that which makes defendants' acts unlawful."

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977); see *Sundstrand Corp.* v. *Sun Chemical Corp.*, 553 F.2d 1033, 1050 (7th Cir. 1977) (requiring "securities law" injury).

[24] A number of Justices have recently questioned the correctness, as an original matter, of *J.I. Case Co.* v. *Borak*, *supra*, in which the Court recognized a private cause of action for damages under Section 14(a). See Pet. 22-23 n.6 (quoting opinions). Whether or not the Court is inclined to overrule *Borak*, concern that it was wrongly decided counsels strongly against extending it even further than it has already been extended. See *Shearson/American Express* v. *McMahon*, 482 U.S. 220, 234 (1987) ("While *stare decisis* concerns may counsel against upsetting [*Wilko* v. *Swan*'s, 346 U.S. 427 (1953)] contrary conclusion * * * we refuse to extend *Wilko*'s reasoning").

rejected the Second Circuit's holding that a minority shareholder could recover under the securities laws if the majority "committed a breach of its fiduciary duty to deal fairly with minority shareholders." See 533 F.2d at 1291. The Court explained that while there "may well be a need for uniform federal fiduciary standards to govern mergers," those standards "should not be supplied by judicial extension of [the securities laws] to 'cover the corporate universe.'" 430 U.S. at 477-480.

That message extends to the *Schlick* decision as well. As one leading commentator recently observed: "It is highly questionable whether [*Schlick* and its progeny] are consistent with the Supreme Court's concern of freeing the federal courts from claims that are based on state law and breaches of fiduciary duties." T. Hazen, *Securities Law* 670 (2d ed. 1990). See also R. Jennings & H. Marsh, *Securities Regulation* 1091 (6th ed. 1987) ("these cases hold that the existence of a remedy under state law *creates* a cause of action under [the federal securities laws]. This would seem to be standing *Santa Fe Industries* on its head"). Whether a differently worded proxy statement may have been helpful to the maintenance of a state court action (by providing so-called "sue facts") is simply irrelevant to determining whether a respondent's *vote* has been unfairly solicited.[25]

For these reasons, the "sue facts" theory of causation has no basis in the language or purpose of Section 14

[25] Even under Section 10(b), it is highly doubtful whether federal jurisdiction should be conferred based on speculations about the prospects of hypothetical litigation in state court. See Jorden & Greif, *Federal Securities Fraud and State Law Fiduciary Duties—A Tour of the Circuits Reveals Continuing Confusion*, 19 Idaho L. Rev. 211, 238 (1983) ("[t]hese disclosure and antifraud statutes were not designed to enable stockholders to evaluate the feasibility of state court injunction suits in federal forums, but rather to facilitate informed investment (or voting) decisions"). But even if this focus on state court litigation had merit under general antifraud provisions such as Section 10(b), it has no place under Section 14(a), a precisely-drafted statute dealing only with corporate voting. See pp. 39-40, *supra*.

(a). But it is even less justifiable to allow minority shareholders to recover damages under Section 14(a) on the theory that a more informative proxy statement might have helped them to place pressure on the controlling shareholder to abandon the merger. Not only is such a "shame facts" theory wholly unrelated to the purpose of Section 14(a), but it also allows damages to be predicated on the most speculative and conjectural assumptions about how a diverse group of directors might react to potentially adverse publicity. Allowing respondents to recover millions of dollars on such a flimsy basis is surely inconsistent with the requirement that those invoking private causes of action satisfy the "traditional principles" of tort actions—including the element of causation. See *Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. 49, 62-63 (1975).[26]

A holding in this case that respondents failed to prove causation of voting injury would not, of course, imply that the *government* lacks effective remedies against misleading proxy statements. A wide array of administrative, injunctive and even criminal sanctions are potentially available upon a showing of a culpable violation of Section 14(a), without regard to whether the proxy statement actually *caused* injury to the voting process. See, *e.g.*, 15 U.S.C. § 78u(d); 15 U.S.C. § 78*o*(b)(4); 15 U.S.C. § 78ff(a). Plaintiffs invoking a private cause of action for *damages* are, however, in a very different position. As this Court has stated: "*Mills* could not be plainer in holding that the questions of liability and relief are separate in private actions under the securities

[26] See also *Bastian* v. *Petren Resources Corp.*, 892 F.2d 680, 685 (7th Cir. 1990) (Posner, J.) (the securities laws embody "the standard rule of tort law that the plaintiff must allege and prove that, but for the defendant's wrongdoing, the plaintiff would not have incurred the harm of which he complains"); *Prosser and Keeton on Torts* § 41, at 269 (5th ed. 1984) ("A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant").

laws, and that the latter is to be determined according to traditional principles." *Rondeau*, 422 U.S. at 64. See also *Blue Chip Stamps*, 421 U.S. at 751 n.14 (limitations on implied damages actions do not inhibit "the SEC [in] bring[ing] actions for injunctive relief"); *Piper*, 430 U.S. at 40 n.26 ("injunctive relief at an earlier stage of the contest is apt to be the most efficacious form of remedy").

B. Even If Non-Voting Injuries Are Deemed Cognizable Under Section 14(a), Respondents Have Not Proved That The Proxy Statement Caused Them Any Harm.

Even if Section 14(a) were construed to authorize private damages actions alleging non-voting injuries, respondents still would be required to sustain the burden of *proving* causation. In this case, the district court and court of appeals dispensed with that requirement entirely and allowed respondents to recover millions of dollars in damages without any showing of how the proxy statement affected their financial situation. This approach went far beyond the reasoning of *Schlick* or any subsequent decision. Those decisions have struggled with the question of how a respondent can prove causation, but none of them has abandoned this basic requirement altogether.[27]

Respondents contended in the courts below that Section 14(a) damages liability would be established if they could prove a material misstatement in a proxy statement that was a necessary prerequisite to the merger. Pet. App. 14a. In an ordinary Section 14(a) case, in which a proxy statement relates to a shareholder vote that can be decided either way, the showing of a material misstatement may serve as a surrogate for proof of causation. Once a plaintiff has shown "a substantial likelihood that a reasonable shareholder would consider [the

[27] Although *Schlick* spoke of the opportunity to establish that an accurate proxy statement would have allowed the plaintiff to obtain relief in state court, it cautioned that "[c]ausality, we think, is sufficiently pleaded; the *proof may, of course, be something else.*" 507 F.2d at 383 (emphasis added).

omitted fact] important in deciding how to vote," *TSC Industries*, 426 U.S. at 449, it is reasonable to apply a rebuttable presumption that any violation of the proxy laws affected the outcome of the vote. See *Mills*, 396 U.S. at 384-385. But as discussed above (see pp. 40-41, *supra*), a showing that shareholders would have considered information important in deciding how to *vote* "hardly embodies a conclusion that the non-controlling minority might have somehow, apart from their voting power, prevented the merger from taking place on the terms proposed." *Swanson* v. *American Consumers Industries*, 475 F.2d 516, 518 n.2 (7th Cir. 1973). It is obvious that if non-voting causation is to be recognized at all, the inquiry cannot focus, as it does in voting cases, on what a reasonable investor would consider important in deciding how to vote. Instead, the plaintiff must prove that if the proxy statement had not contained the challenged misrepresentation, then the minority shareholders would have been able to enjoin the merger. See *Santa Fe*, 430 U.S. at 474 n.14.

Thus, even if non-voting injuries were actionable under Section 14(a), minority shareholders still would be required to prove "that they would have succeeded" in preventing the merger "if they had been advised of the truth and had pursued [their available] remedies." *Madison Consultants* v. *FDIC*, 710 F.2d 57, 64 (2d Cir. 1983). Although the circuits have disagreed about the applicable standard of proof, they are united in requiring distinct and non-speculative proof of causation in this context. The Second and Ninth Circuits have held that a plaintiff must show that he would have actually "succeeded in preventing the loss he in fact suffered." *Madison Consultants*, 710 F.2d at 65; accord, *Kidwell ex rel. Penfold* v. *Meikle*, 597 F.2d 1273, 1294 (9th Cir. 1979). The Third Circuit similarly requires the plaintiff to show that he would have had a reasonable probability of success in a state-court injunctive proceeding. See *Healey* v. *Catalyst Recovery of Pennsylvania, Inc.*, 616 F.2d 641, 647 (3d Cir. 1980). The Fifth

Circuit has taken the most permissive approach, but it still requires the plaintiff to demonstrate that he could have made out a prima facie case for state-court injunctive relief. See *Alabama Farm Bureau Mutual Casualty Co.* v. *American Fidelity Life Ins. Co.*, 606 F.2d 602, 614 (5th Cir. 1979).[28]

In our view, the standard adopted by the Second and Ninth Circuits is most consistent with this Court's prior decisions requiring non-speculative proof of causation. See pp. 37-38, *supra*. Unless a plaintiff can prove that a more informative proxy statement would have allowed him to prevent the merger, it cannot possibly be said that the misrepresentation "caused" his injury.[29] But resolution of this difference among the circuits is not critical to the outcome of this case. For no matter how the standard of proof is defined, it is manifest that respondents did not and could not satisfy the requirement of establishing causation in a non-speculative manner.

---

[28] Although these cases have arisen under Rule 10b-5, the causation requirement extends to Section 14(a) as well. See L. Loss, *Fundamentals of Securities Regulation* 809 (2d ed. 1988) (discussing cases); R. Jennings & H. Marsh, *Securities Regulation* 1287 (6th ed. 1987) (the standard of causation under Section 14(a) is at least as strict as the standard under Rule 10b-5).

[29] Judge Mansfield's analysis for the Second Circuit in *Madison Consultants* (710 F.2d at 65) is compelling:

> "In our view the 'cause of action' test and the 'prima facie case' test are too weak to satisfy Rule 10b-5's requirement that the plaintiff's injury be caused in fact by the defendant's conduct. * * * A test that looks only to the statement of a claim for relief would mandate a finding of causation even in cases in which the plaintiff would almost certainly have lost at a later stage in the case, such as on a summary judgment motion based on undisputed facts. A test that looks to the existence of a prima facie case, besides employing a notoriously ambiguous piece of legal terminology * * * would require a finding of causation even when the defendant could devastatingly rebut the plaintiff's case. The adoption of such standards would come too close to the creation of a presumption of causation."

To begin with, throughout this litigation, respondents insisted on trying their case without offering any proof of causation. See Opp. 22 ("Respondents established the causal connection between the merger and their loss by proving that the stock the merger converted into $42 was worth $60. That is exactly what *Mills* requires"). Thus, respondents never even attempted to show that the merger could have been prevented on a "sue facts" or a "shame facts" theory if the proxy statement had made what they deemed to be accurate disclosures. Similarly, consistent with respondents' litigation strategy, and despite repeated objections, the district court never asked the jury to consider the issue of causation under proper instructions.[30] Instead, the court merely instructed the jury that if it found that there was a material misrepresentation and that the proxy statement was an "essential link" in the transaction (J.A. 426), then it could find in favor of respondents. Indeed, the court told the jury that "you are instructed it is no defense that the votes of the minority stockholders were not needed to approve the transaction." J.A. 427.

But beyond that, in view of the prior rulings of the Virginia courts and regulators, it is apparent that respondents could not have met their burden of proving causation in this non-voting context. Immediately after the proxy statement was issued, a group of minority shareholders (all of whom are parties to this litigation) sought to stop the shareholder meeting and the merger in two separate Virginia proceedings. In a lengthy submission to the Virginia Corporation Commission, respondent Weinstein and a group of other shareholders asked the Commission to stop the merger because the Bank's directors allegedly acted in violation of their

[30] Petitioners repeatedly urged the district court to hold that this was not an ordinary voting case and that the *Mills* standard should not be applied. See J.A. 76-77 (brief in support of summary judgment, arguing that the *Schlick* "rule makes no sense, and it particularly makes no sense in this case"); J.A. 426, 435 (objection to instruction on "essential link").

fiduciary duty, acted without a valid corporate purpose, failed to conduct an independent investigation or secure an independent appraisal, and offered shareholders a grossly inadequate price. J.A. 29-36. Notwithstanding these allegations, the Corporation Commission refused to block the merger. J.A. 37-39.

The shareholders had no more success in state court, despite repeated efforts to obtain an injunction or appraisal. Armed with detailed allegations based on information derived from the proxy statement, they contended in state court that the merger plan afforded them inadequate consideration, that the directors breached their fiduciary duty by failing to retain an independent financial adviser, that the directors acted in violation of their duties of care and loyalty and suffered from a conflict of interest, and that the directors purportedly committed deception through numerous non-disclosures and misrepresentations. J.A. 6-18. The Virginia Circuit Court nonetheless denied all relief and the Virginia Supreme Court declined review. Pet. App. 31a-33a; J.A. 19-28. As in *Santa Fe*, it is clear beyond dispute that respondents "could not have enjoined the merger." 430 U.S. at 474 n.14.

By the same token, respondents could not possibly have proven that a differently worded proxy statement would have "shamed" petitioners into abandoning the merger. This merger was authorized by state statute regardless of minority shareholder dissent. The merger served important corporate purposes; it had the approval of state and federal bank regulators; state courts had refused to enjoin it or afford an appraisal; and the vast majority of minority shareholders were delighted with the 30% premium they received. See pp. 2-10, *supra*. It is ludicrous to suggest that a redrafting of the proxy statement would have "shamed' the majority shareholder or the Bank's directors into abandoning this beneficial transaction.[31]

[31] The impermissibly speculative nature of the "shame facts" theory of causation is apparent upon considering the damages

The lower courts never addressed any of these causation issues because they misread *Schlick* as totally dispensing with the element of causation. The effect of that error was to expose petitioners to millions of dollars in liability, even though respondents never attempted to prove—and could not have proved—that the supposedly misleading proxy statement caused them any financial injury, much less the enormous damages awarded in this case.

CONCLUSION

The decision of the court of appeals should be reversed with directions to enter judgment in petitioners' favor on the federal securities law claims.

Respectfully submitted.

JOHN S. STUMP
McGuire, Woods, Battle & Boothe
8280 Greensboro Drive
McLean, VA 22102

LEWIS T. BOOKER
Hunton & Williams
707 East Main Street
Post Office Box 1535
Richmond, VA 23212

STEPHEN M. SHAPIRO
Counsel of Record
ANDREW L. FREY
KENNETH S. GELLER
LAWRENCE C. MARSHALL
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 463-2000

Counsel for Petitioners

JUNE 1990

---

awarded in this case. A jury would have to extrapolate from a hypothetical level of "shame" to an ability to extract $60 per share from the majority shareholder—an award of damages that was twice as much as the shares traded for during the years preceding the merger. See Pet. App. 64a. If respondents had somehow succeeded in halting or even delaying the merger, all minority shareholders would have been left with shares with a market value of $32 per share—or, more likely, a lesser amount, since the prospect of a buyout in the future would have been greatly reduced. Such a development would not have been welcomed by the great majority of minority shareholders who desired to sell their shares *promptly* at a *30% premium*. See pp. 8, 10, *supra*.

STATUTORY APPENDIX

STATUTORY APPENDIX

1. Section 14(a) of the Securities Exchange Act, 15 U.S.C. § 78n(a), provides:

> "It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 78*l* of this title."

2. Section 12(i) of the Securities Exchange Act, 15 U.S.C. § 78*l*(i), provides in pertinent part:

> "In respect of any securities issued by banks the deposits of which are insured in accordance with the Federal Deposit Insurance Act [12 U.S.C. § 1811 *et seq.*] * * * the powers, functions, and duties vested in the Commission to administer and enforce this section and sections 78m, 78n(a), 78n(c), 78n(d), 78n(f), and 78p of this title * * * are vested in the Federal Deposit Insurance Corporation * * *."

3. Section 28(a) of the Securities Exchange Act, 15 U.S.C. § 78bb(a), provides in pertinent part:

> "[N]o person permitted to maintain a suit for damages under the provisions of this chapter shall recover, through satisfaction of judgment in one or more actions, a total amount in excess of his actual damages on account of the act complained of."

4. 12 C.F.R. § 335.206(a), promulgated by the Federal Deposit Insurance Corporation, provides in pertinent part:

> "No solicitation or communication subject to this Subpart B shall be made by means of any state-

ment, form of proxy, notice of meeting, or other communication, written or oral, containing any statement that, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or that omits to state any material fact necessary in order to make the statement therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter that has become false or misleading. Depending upon particular circumstances, the following may be misleading within the meaning of this section: * * * material that directly or indirectly impugns character, integrity, or personal reputation, or directly or indirectly makes charges concerning improper, illegal, or immoral conduct or associations, without factual foundation; * * *."

5. Section 13.1-718E of the Code of Virginia provides in pertinent part:

> "Unless this chapter or the board of directors, acting pursuant to subsection C of this section, requires a greater vote, the plan of merger or share exchange to be authorized shall be approved by each voting group entitled to vote on the plan by more than two-thirds of all the votes entitled to be cast by that voting group."

6. Section 13.1-614B of the Code of Virginia provides in pertinent part:

> "No court within or without this Commonwealth shall have jurisdiction to enjoin or delay the holding of any meeting of directors or shareholders for the purpose of authorizing or consummating any amendment, merger, exchange or dissolution or the execution or filing with the Commission of any articles or other documents for such purpose, except pursuant to subsection C of § 13.1-661 or for fraud."

7. Section 6.1-43 of the Code of Virginia provides in pertinent part:

> "Banks may merge upon compliance with the provisions of Article 12 * * * of the Virginia Stock Corporation Act. However, * * * the provisions of § 13.1-730 [dissenters' right to appraisal remedy] shall not apply to a merger under this section."

8. Section 13.1-692.1A of the Code of Virginia provides in pertinent part:

> "In any proceeding brought by or in the right of a corporation or brought by or on behalf of shareholders of the corporation, the damages assessed against an officer or director arising out of a single transaction, occurrence or course of conduct shall not exceed the lesser of:
>
> 1. The monetary amount, including the elimination of liability, specified in the articles of incorporation, or, if approved by the shareholders, in the bylaws as a limitation on or elimination of the liability of the officer or director; or
>
> 2. The greater of (i) $100,000 or (ii) the amount of cash compensation received by the officer or director from the corporation during the twelve months immediately preceding the act or omission for which liability was imposed."

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether in this action under Section 14(a) of the Securities Exchange Act of 1934 the proxy statement's misstatements submitted to the jury were so obviously unimportant or devoid of factual content that no reasonable stockholder could have regarded them as untrue statements of material fact.

2. Whether this Court should consider the causation questions raised by petitioners despite the fact that petitioners failed to raise these questions in either court below.

3. Whether minority stockholders ought to be precluded from bringing an action for damages under Section 14(a) against the issuer of a misleading proxy statement even though solicitation of minority stockholder votes was necessary to accomplish the transaction.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
COUNTERSTATEMENT	1
SUMMARY OF ARGUMENT	7
ARGUMENT	12
I. PETITIONERS CANNOT SATISFY THEIR BURDEN UNDER *TSC INDUSTRIES v. NORTHWAY, INC.* OF SHOWING THAT THE MISSTATEMENTS WERE IMMATERIAL AS A MATTER OF LAW	12
A. The Factual Representation That "The Merger Has Been Approved By The Board Of Directors Because It Provides An Opportunity For The Bank's Public Shareholders To Achieve A High Value For Their Shares" Was Misleading	13
B. The Factual Representation That KBW Independently Passed On The Fairness Of The Merger To Minority Stockholders Was Misleading	22
C. The Proxy Statement Did Not Disclose All Material Facts With Respect To The Directors' Recommendation And KBW's Role	26
II. THIS COURT SHOULD NOT CONSIDER THE CAUSATION ISSUES ASSERTED BY PETITIONERS BECAUSE THOSE ISSUES WERE WAIVED IN THE COURTS BELOW AND THE COURT OF APPEALS DID NOT DECIDE THEM	29
III. THE JURY'S VERDICT THAT THE DECEPTIVE PROXY SOLICITATION CAUSED RESPONDENTS' INJURY SHOULD BE AFFIRMED BECAUSE THE ISSUE WAS SUBMITTED TO THE JURY ON CORRECT INSTRUCTIONS AND THE EVIDENCE SUPPORTED THE VERDICT	33

TABLE OF CONTENTS—Continued

	Page
A. The Court Should Reject Petitioners' Preclusive Causation Argument	33
B. The Causation Issue Was Submitted To The Jury On Proper Instructions In Which All Of The Parties Concurred	38
C. The Evidence Of Causation Supported The Verdict	43
CONCLUSION	48

TABLE OF AUTHORITIES

CASES:	Page
Basic, Inc. v. *Levinson*, 485 U.S. 224 (1988)	16, 37, 39
Berg v. *First American Bankshares, Inc.*, 796 F.2d 489 (D.C. Cir. 1986)	21
Black v. *Cutter Laboratories*, 351 U.S. 292 (1956)	32
Board of Trustees v. *Fox*, 109 S. Ct. 3028 (1989)	16
Borden v. *Sinskey*, 530 F.2d 478 (3d Cir. 1976)	44
Bowen v. *American Hospital Association*, 476 U.S. 610 (1986)	32
Central Hudson Gas & Electric Corp. v. *Public Service Commission*, 447 U.S. 557 (1980)	16
Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)	32
Chris-Craft Industries v. *Piper Aircraft Corp.*, 480 F.2d 341 (2d Cir.), *cert. denied*, 414 U.S. 910 (1973)	12
City of Newport v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981)	32
City of St. Louis v. *Praprotnik*, 485 U.S. 112 (1988)	32
City of Springfield v. *Kibbe*, 480 U.S. 257 (1987)	30, 32
Cowin v. *Bresler*, 741 F.2d 410 (D.C. Cir. 1984)	29, 36, 37
Dasho v. *Susquehanna Corp.*, 461 F.2d 11 (7th Cir.), *cert. denied*, 408 U.S. 925 (1972)	44, 47
Day v. *Avery*, 548 F.2d 1018 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 908 (1977)	28
Efros v. *Nationwide Corp.*, [1982-1983 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 99,077 (S.D. Ohio Jan. 17, 1983)	35
Eisenberg v. *Gagnon*, 766 F.2d 770 (3d Cir.), *cert. denied*, 474 U.S. 946 (1985)	26
First Virginia Bankshares v. *Benson*, 559 F.2d 1307 (5th Cir. 1977), *cert. denied*, 435 U.S. 952 (1978)	27
Fradkin v. *Ernst*, 571 F. Supp. 829 (N.D. Ohio 1983)	14
Franchard Corp., 42 S.E.C. 163 (1964)	20
Galloway v. *United States*, 319 U.S. 372 (1943)	6, 7

TABLE OF AUTHORITIES—Continued

	Page
Graver Tank & Mfg. Co. v. *Linde Air Products Co.*, 336 U.S. 271 (1949)	6
Healy v. *Catalyst Recovery of Pennsylvania, Inc.*, 616 F.2d 641 (3d Cir. 1980)	42
Herb v. *Pitcairn*, 324 U.S. 117 (1945)	32
Herman & MacLean v. *Huddleston*, 459 U.S. 375 (1983)	16
Herskowitz v. *Nutri/System, Inc.*, 857 F.2d 179 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 1315 (1989)	13
Howing Co. v. *Nationwide Corp.*, 826 F.2d 1470 (6th Cir. 1987), *cert. denied*, 486 U.S. 1059 (1988)	27
Interstate Circuit, Inc. v. *United States*, 306 U.S. 208 (1939)	46
J.I. Case Co. v. *Borak*, 377 U.S. 426 (1964)	20, 21
Kessler v. *Commonwealth Doctors' Hospital, Inc.*, 212 Va. 497, 185 S.E.2d 43 (1971)	44
Laurenzano v. *Einbender*, 264 F. Supp. 356 (E.D.N.Y. 1966)	34, 37
Lavender v. *Kurn*, 327 U.S. 645 (1946)	11, 43, 47
Lynch v. *Fulks*, [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,831 (D. Kan. Dec. 12, 1980)	29
Madison Consultants v. *FDIC*, 710 F.2d 57 (2d Cir. 1983)	41
McMahan & Co. v. *Wherehouse Entertainment, Inc.*, 900 F.2d 576 (2d Cir. 1990)	22
Meriwether v. *Coughlin*, 879 F.2d 1037 (2d Cir. 1989)	43
Merrick v. *Farmers Insurance Group*, 892 F.2d 1434 (9th Cir. 1990)	41
Meyers Parking System, Inc., Exchange Act Release No. 26,069, 41 SEC Docket 1061 (Sept. 12, 1988)	27
Milkovich v. *Lorain Journal Co.*, 110 S. Ct. 2695 (1990)	7, 12, 14, 15

TABLE OF AUTHORITIES—Continued

	Page
Mills v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970)	*passim*
Oklahoma City v. *Tuttle*, 471 U.S. 808 (1985)	30, 32
Osterneck v. *E.T. Barwick Industries*, 825 F.2d 1521 (11th Cir. 1987), *aff'd*, 489 U.S. 169 (1989)	31
Piper v. *Chris-Craft Industries*, 430 U.S. 1 (1977)	36
Robbins v. *Banner Industries*, [1967-1969 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,309 (S.D.N.Y. Nov. 27, 1968)	35
Rowland v. *Kable*, 174 Va. 343, 6 S.E.2d 633 (1940)	44
Santa Fe Industries v. *Green*, 430 U.S. 462 (1977)	20, 41
Schlick v. *Penn-Dixie Cement Corp.*, 507 F.2d 374 (2d Cir. 1974), *cert. denied*, 421 U.S. 976 (1975)	37, 38
SEC v. *Capital Gains Research Bureau*, 375 U.S. 180 (1963)	16
SEC v. *Falstaff Brewing Corp.*, 629 F.2d 62 (D.C. Cir.), *cert. denied*, 449 U.S. 1012 (1980)	14, 16, 28
Swanson v. *American Consumer Industries*, 415 F.2d 1326 (7th Cir. 1969)	37
Tanzer v. *Haynie*, 405 F. Supp. 650 (S.D.N.Y. 1976)	27
TSC Industries v. *Northway, Inc.*, 426 U.S. 438 (1976)	7, 12, 22, 28
United States v. *Arthur Young & Co.*, 465 U.S. 805 (1984)	22
United States v. *Atkinson*, 297 U.S. 157 (1936)	30
United States v. *Park*, 421 U.S. 658 (1975)	40
Van Buskirk v. *Carey Canadian Mines, Ltd.*, 760 F.2d 481 (3d Cir. 1985)	41
Virginia State Board of Pharmacy v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976)	16
Vulcan Metals Co. v. *Simmons Manufacturing Co.*, 248 F. 853 (2d Cir.), *cert. denied*, 247 U.S. 507 (1918)	15

TABLE OF AUTHORITIES—Continued

STATUTES, RULES, AND REGULATIONS: Page

Securities Exchange Act of 1934, 15 U.S.C. §§ 78a *et seq.*
- Section 10(b), 15 U.S.C. § 78j(b) 37
- Section 12, 15 U.S.C. § 78*l* 20, 37
- Section 13(e)(1), 15 U.S.C. § 78m(e)(1) 12
- Section 14(a), 15 U.S.C. § 78n(a) ..... *passim*
- Section 14(e), 15 U.S.C. § 78n(e) 36

Fed. R. Civ. P. 30(b)(6) 23
Fed. R. Civ. P. 50 30
Fed. R. Civ. P. 51 ..... 31, 39
Supreme Court Rule 15.1 30
Va. Code Ann. § 13.1-691 ..... 3, 11, 43
Va. Code Ann. § 13.1-718 ..... 2, 3
12 C.F.R. § 335.206(a) 26
12 C.F.R. § 335.212, Item 14(a) 12
12 C.F.R. § 335.409 26
17 C.F.R. § 240.10b-5 ..... 36, 40
17 C.F.R. § 240.13e-100 ..... 26, 27
17 C.F.R. § 240.14a-9 26
45 Fed. Reg. 62,481-62,482 (1980) 26
46 Fed. Reg. 25,205-25,206 (1981) 26

LEGISLATIVE HISTORY:

H.R. Rep. No. 1383, 73d Cong., 2d Sess. (1934) 37
S. Rep. No. 1455, 73d Cong., 2d Sess. (1934) 37

OTHER AUTHORITIES:

American Law Institute, *Federal Securities Code* (1980) 10, 39, 42
Booth, *Management Buyouts, Shareholder Welfare, and the Limits of Fiduciary Duty*, 60 N.Y.U. L. Rev. 630 (1985) 35
Charles L. Ephraim, SEC No-Action Letter (Sept. 30, 1987) 27
W. Fletcher, *Cyclopedia of the Law of Private Corporations* (1990) 14, 44
F. Harper, F. James & O. Gray, *The Law of Torts* (2d ed. 1986) 15

TABLE OF AUTHORITIES—Continued

Page

T. Hazen, *The Law of Securities Regulation* (2d ed. 1990) 36
Hazen, *Corporate Chartering and the Securities Markets: Shareholder Suffrage, Corporate Responsibility and Managerial Accountability*, 1978 Wis. L. Rev. 391 (1978) 20, 21, 37
Restatement (Second) of Torts (1976) 15, 28
Seligman, *The Historical Need For a Mandatory Corporate Disclosure System*, 9 J. Corp. L. 1 (1983) 21
C. Wright & A. Miller, *Federal Practice and Procedure* 30, 43

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1448

VIRGINIA BANKSHARES, INC., *et al.*,
Petitioners,

v.

LEWIS I. SANDBERG,
Respondent.

FIRST AMERICAN BANKSHARES, INC., *et al.*,
Petitioners,

v.

PAUL H. WEINSTEIN, *et al.*,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

BRIEF FOR RESPONDENTS

COUNTERSTATEMENT

Prior to the merger out of which this case arises, respondents were stockholders of First American Bank of Virginia ("the Bank"), the dominant bank in northern Virginia, which had just enjoyed its third consecutive year of record earnings. Fourth Circuit Joint Appendix ("Fourth Circuit JA") 718. As the jury specifically

found, respondents' stock was worth $60 per share. JA 527. *See* Petition Appendix ("Pet. App.") 19a. Petitioner First American Bankshares, Inc. ("FABI"), which owned 85% of the Bank's stock,[1] obtained the needed approval of minority stockholders to the taking of their stock for only $42 per share by means of a proxy statement that, as the jury found, falsely represented that the Bank's board had approved the merger because it provided minority stockholders an opportunity to achieve a high value for their shares and that an independent investment banker had passed on the fairness of the merger to minority stockholders.

FABI's actions arose out of a report by its Treasurer showing that acquisition of the minority's stock should be a "top priority" because acquiring the minority stock would significantly increase FABI's earnings—so much so as to be profitable, even in the first year, at a price greater than $60 per share. JA 437-439.[2]

FABI promptly decided to acquire the minority's stock for $42 per share by means of a freeze-out merger. JA 186-191. FABI's ownership of 85% of the Bank's stock provided the votes necessary to give itself stockholder approval of the $42 price it wanted to pay. Va. Code Ann. § 13.1-718(B), (E). Nonetheless, FABI could not force the minority to give up its stock at $42 per share unless the Bank's board of directors validly approved the

[1] FABI owned its stock through a wholly-owned subsidiary, Virginia Bankshares, Inc. The two are referred to collectively as FABI.

[2] At trial, FABI attacked its own Treasurer, the author of the study on which the merger was based, in an effort to show that his study proved only that FABI would increase its net income by $299,000 a year by investing $45 million. *See, e.g.*, JA 349. FABI's Treasurer nonetheless explained that the $299,000 a year return was based on an assumption that the $45 million was borrowed and all of the interest was paid. JA 152-154. He pointed out that his study showed that if FABI invested its own funds, the return would be $3.7 million (or 8.3%) in the first year. JA 155. In fact, FABI earned 10% in the first year. JA 393.

merger, recommended it to stockholders, and waived its right not to consummate the merger despite stockholder approval. Va. Code Ann. § 13.1-718(B)(1), (J). FABI's success with the Bank's board was summarized in the holding of the court of appeals (not under review here): "The evidence fully supports a view that the directors exercised no independent judgment whatsoever with regard to the interests of the minority stockholders," but "merely rubber-stamped everything placed before them by [FABI]." Pet. App. 19a.[3]

FABI's success in neutralizing the Bank's board was facilitated by its Executive Vice President Jack Beddow, who was both the FABI official primarily responsible for accomplishing the freeze-out and a director of the Bank. JA 186. Beddow, however, was a double-edged sword. Because of Beddow's divided loyalties, his actions as a Bank director made the merger voidable, or subject to suit for restitution of the value of the stock taken in the merger, unless the actions of the Bank's board were approved by the minority stockholders. Petitioners so recognized by seeking and obtaining an instruction in the district court that the effect of Beddow's conflict could be avoided pursuant to Virginia's director conflict of interest statute, Va. Code Ann. § 13.1-691, if "the *minority stockholders* of the First American Bank * * * *approved* of the merger * * *." JA 431 (emphasis added).

Minority stockholder approval was also necessary to avoid harm to the Bank from the adverse public reaction FABI anticipated if the minority stockholders realized

[3] That same conclusion also was reached by District Judge Albert V. Bryan, Jr., who heard all the evidence presented to the jury and stated, in his order denying petitioners' post-trial motions, that the evidence showed that "the directors didn't make any judgment on [the merger]. It was rubber-stamped right all the way through." JA 531. Thus, the jury, the trial judge, and the court of appeals all rejected the view of the evidence that now appears at pages 6 to 8 of petitioners' brief in support of the tired contention that the board approved the merger because it was fair.

that they were being compelled to give up their stock at an unfair price. *See, e.g.*, JA 454 and *infra* p. 45. FABI thus decided, and represented to the Bank's chairman, that it was necessary that the board go to stockholders "for their approval as well." JA 202; *see infra* pp. 45-46.

To induce the minority stockholders to give their approval to the taking of their $60 stock for $42, FABI, the buyer, drafted proxy soliciting materials to be issued to the Bank's stockholders in the name of the Bank's directors. JA 241, 318, 467 *et seq.* These materials "urg[ed]" minority stockholders to grant proxies for votes in favor of the merger, Pet. App. 36a, and in support of that request, represented that (1) the Bank's board had approved the merger "because it provides an opportunity for the Bank's public shareholders to achieve a high value for their shares," Pet. App. 53a; and (2) an investment banker, Keefe, Bruyette & Woods ("KBW"), had originated the $42 price on the basis of its independent valuation of the stock and had opined that the price was fair to minority stockholders. Pet. App. 38a, 54a.

These representations were designed to make the freeze-out of the stockholders of the Bank look different from FABI's failed effort, a year earlier, to freeze out the minority stockholders of its Maryland subsidiary. *See* JA 319. That effort had been blocked when an independent investment banker hired by the subsidiary's board concluded that FABI's price was inadequate. JA 297. The instant proxy statement thus urged stockholders to grant their proxies in favor of the merger because, this time, an independent investment banker originated the $42 price and the Bank's board had approved the merger because it offered a high value to minority stockholders.[4]

[4] The board of the Maryland subsidiary refused to approve the merger. JA 297. The Virginia board's approval of the merger was facilitated by FABI's representation that the transaction would go to the public stockholders for their approval as well.

Those representations were entirely false, and the jury so found. In fact, the Bank's board neither saw nor approved the proxy statement before it was disseminated in its name to the Bank's stockholders. JA 226-227. Specifically, the Bank's board did not see or approve the representation as to its reason for approving the merger, and did not determine the value of the minority stock at all, or approve the merger because it provided minority stockholders an opportunity to achieve a high value for their shares. *See infra* pp. 16-18. To the contrary, directors admitted at trial that the board approved the merger because it believed it had no other choice and would be replaced if it did not. *See, e.g.*, JA 274, 281-282 and *infra* p. 18. Moreover, KBW had not performed an independent valuation of the stock, or opined that the $42 price was fair to minority stockholders. Instead, it simply agreed to recommend the price that FABI disclosed to KBW as the price it wanted to pay. JA 259-260, 356-357, despite FABI's knowledge that doing so would compromise KBW's independence. JA 173-174; *see infra* pp. 23-26.

The proxy statement succeeded in convincing minority shareholders to approve the merger. As petitioners put it in their brief, minority stockholders were "delighted" to approve the merger, thereby authorizing FABI to pay them $30.8 million for stock worth more than $44 million. Brief for the Petitioners ("Pet. Br.") 49.

Following consummation of the merger, respondent Sandberg commenced this action in the United States District Court for the Eastern District of Virginia. After a three-day trial, the jury returned a verdict for $18 per share against FABI and the directors pursuant to instructions requiring findings that the proxy statement contained materially false or misleading statements of fact, JA 420, 422, was an essential link in the accomplishment of the merger, JA 426, and proximately caused the injury sustained by minority stockholders by taking their

stock for $42 per share. JA 424.[3] The *Sandberg* judgment was given collateral estoppel effect in favor of the other respondents, who had filed a separate action after petitioners successfully opposed both class certification and attempts to intervene in the *Sandberg* action. *See* Pet. App. 28a-29a.

On appeal, the Fourth Circuit affirmed the judgment for respondents in all respects, reversed the district court's denial of class certification, and remanded for entry of an order certifying a class. This Court granted certiorari to review two questions of law.

This Court's review of those questions is governed by the fundamental rules that this Court does not sit to review concurrent findings of fact by two courts below. *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 274-275 (1949), and, in any event, that the evidence and inferences must be viewed in the light most favorable to the jury's verdict. *Galloway* v. *United States*, 319 U.S. 372 (1943). Petitioners' arguments, however, are based on factual assertions that were rejected by the jury's verdict for respondents. For example:

• Petitioners assert that the stock taken pursuant to the deceptive proxy statement was worth no more than the $32 per share "market price" and thus the taking of their stock for $42 was "beneficial." *See, e.g.*, Pet. Br. 1-4, 49-50. Petitioners ignore the jury's specific finding that the minority stock was worth $60 per share, JA 527, and the court of appeals' specific rejection of the valuation arguments advanced here. Pet. App. 19a-21a. Petitioners also ignore the evidence supporting the jury's verdict, which included the concession of petitioners' own expert that the "market price" was derived from a market that was "thin," "not open," and one in which "the parent set the price," JA 347, 354, 247-249, 452, as well as the comprehensive testimony of respondents' expert. *See* Pet. App. 19a-21a.

[3] The verdict against petitioners was based on § 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(a). The jury also returned an alternate verdict in the same amount against the directors on a claim for breach of fiduciary duty, not under review here. JA 527.

• Petitioners assert that the $42 merger price was originated by KBW, Pet. Br. 5, but the evidence showed that the $42 price was parrotted back—not originated—by KBW. When FABI first contacted KBW, it disclosed the price it wanted to pay, knowing that doing so would compromise KBW's independence. JA 173-174, 259-260.

• Petitioners contend that the Bank's board approved the merger because it was fair to minority stockholders. Pet. Br. 6-8. But the jury found that the Bank's board "exercised no independent judgment whatsoever with regard to the interests of the minority stockholders" and simply "rubber-stamped everything placed before them by [FABI]." Pet. App. 19a.

Petitioners' effort to reargue the facts disregards the standard of review of jury verdicts, *see Galloway* v. *United States*, *supra*, directly contradicts petitioners' representation to this Court in support of the petition for certiorari, Reply Brief for Petitioners 1, and necessitates a detailed recitation of the facts in connection with related legal arguments below.

SUMMARY OF ARGUMENT

I. The jury's verdict that the representations at issue were misrepresentations of material fact cannot be overturned unless petitioners show that, as a matter of law, the misstatements were so obviously unimportant or so devoid of factual content that no reasonable stockholder could have regarded them as untrue statements of material fact. *TSC Industries* v. *Northway, Inc.*, 426 U.S. 438, 450 (1976). *See also Milkovich* v. *Lorain Journal Co.*, 110 S. Ct. 2695, 58 U.S.L.W. 4846, 4851 (1990). As shown in the Brief for the Securities and Exchange Com-

mission and the Federal Deposit Insurance Corporation as *Amicus Curiae* ("Government Brief" or "GB"), the misstatements relate to matters that are highly material to investors, and were plainly matters of fact.

The proxy statement flatly represented as fact that "[t]he Plan of Merger has been approved by the Board of Directors because it provides an opportunity for the Bank's public shareholders to achieve a high value for their shares." Pet. App. 53a. The jury was instructed to consider whether this statement "was false or misleading, because the claimed high values for the shares was not the reason for [the board's] approval[.]" JA 421. The objective evidence—including the pertinent minutes, contemporaneous notes, and testimony by directors as to actions in the boardroom—supported the jury's verdict that the representation in the proxy statement was contrary to the objective facts. Liability was not imposed on petitioners for failure to discharge any affirmative duty to disclose a subjective motivation, but for falsely asserting that the board had made a determination it never made.

The other pertinent language represented that KBW was "independent," Pet. App. 38a, had given its "opinion as to the value to be ascribed" to the minority stock, *id.* at 54a, and had "pass[ed] on the fairness of the [m]erger" to minority stockholders. *Id.* at 38a. The jury was asked to consider whether the proxy statement falsely represented that KBW "was independent and had passed on the fairness of the merger." JA 422. The evidence supported the jury in finding that the representations as to what KBW did were untrue statements of material fact because KBW did not perform an independent analysis of the value of the stock and did not pass on the fairness of the merger to minority stockholders.

The views of the government agencies responsible for enforcing the securities laws that these issues were properly submitted to the jury weigh heavily in favor of affirmance. *See* GB 18 & n.27; 21 & n.33.

II. This Court should not consider the causation arguments asserted by petitioners because those arguments were not preserved in either of the courts below, and were not decided by the court of appeals. It would be unfair to respondents, and contrary to this Court's policy against reversing a jury's verdict on the basis of arguments not presented to the district court, to permit petitioners to seek reversal of the judgment on the ground that a showing of causation is precluded, as a matter of law, when a stockholder owns sufficient stock to grant itself the margin of approval normally required with respect to a particular transaction. Petitioners were asking the jury in this very case to find that minority stockholder approval of the merger eliminated the otherwise paralyzing effects of a director conflict of interest. Thus, petitioners were in no position to ask the jury to find that the votes they urgently solicited were unnecessary.

Nor was the argument made in the court of appeals, and the court of appeals was plainly not passing on it when it noted petitioners' concession "that the proxy statement was, under Virginia law, an essential link for accomplishing the merger." Pet. App. 13a n.1. Moreover, petitioners did not argue to the court of appeals, nor did the court of appeals decide, any question as to the correctness of the district court's causation instructions or the sufficiency of respondents' proof of causation.

III. Petitioners' argument that causation can never be shown when a stockholder has sufficient votes to grant itself the margin of approval normally required for a transaction should not be accepted because, as shown in the Government's Brief, there are a variety of circumstances in which injury within the scope of Section 14(a) flows directly from a deceptive proxy statement, even though a single stockholder owns sufficient stock to grant itself the margin of approval normally required for the transaction.

The error of petitioners' position is particularly egregious in situations, like this one, where, because of the circumstances of the particular case, minority stockholder approval is necessary to accomplish the transaction. For example, the votes of minority stockholders may be necessary, as they were here, to ratify action by the board of directors that is voidable under state law because a conflict of interest infects the action of the board. Similarly, minority stockholders' injury may, as here, flow directly from the use of a deceptive proxy statement where a controlling stockholder determines that it will not compel a freeze-out merger unless it is approved by minority stockholders. In such circumstances, the votes of a majority of the minority stockholders are necessary to accomplish the transaction and the proxy solicitation is thus just as necessary as was the solicitation in *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 379 (1970).

The district court's causation instructions correctly submitted the issue of causation to the jury. At the request of all parties, the district court gave a proximate cause instruction substantially the same as that set forth in the American Law Institute's *Federal Securities Code* for civil actions based on proxy fraud. That instruction required the jury to find that petitioners' conduct with respect to the deceptive proxy statement was a substantial factor in causing respondents' injury and that the injury was a direct result or reasonably probable consequence of petitioners' conduct. The district court gave further instructions, with the concurrence of all parties, that (1) the plaintiff was not required to prove subjective reliance on the deceptive proxy solicitation if she proved that the proxy solicitation was an essential link in accomplishing the merger; and (2) the jury could find that the proxy solicitation was an essential link if it was necessary for the Bank to solicit proxies from minority stockholders.

Finally, the evidence of causation—the sufficiency of which petitioners never challenged in the courts below—amply supported the jury in finding that, in the particular circumstances of this case, minority stockholder approval was necessary to accomplishing the transaction. Petitioners can overturn the jury verdict only by showing that it had no evidentiary basis. *Lavender* v. *Kurn*, 327 U.S. 645 (1946). Such a showing cannot be made here.

The evidence showed that minority stockholder approval was necessary, both to ratify the tainted action of the board, and to comply with a condition established by FABI. Unless ratified by a majority of the minority stockholders, the merger could be undone, either at the suit of minority stockholders without the requirement of proof of injury or by suits for restitution of the value of the stock taken. Petitioners themselves asked the jury to find that the effect of the otherwise paralyzing conflict of interest could be removed as an obstacle to effective consummation of the merger if "the *minority stockholders* of the First American Bank * * * *approved* of the merger * * *." JA 431 (emphasis added). *See* Va. Code Ann. § 13.1-691. The evidence also showed that, because FABI was not willing to suffer the adverse business consequences of taking the minority's stock against its will, FABI decided, and informed the Bank's chairman, that minority stockholder approval was a condition of the merger. Petitioners neither presented any evidence—nor argued—to the jury that the minority shareholder approval they urgently solicited was unnecessary.

Considered in the terminology petitioners prefer, petitioners' solicitation of minority stockholder approval by means of a materially deceptive proxy statement proximately caused respondents' loss of available means of self-protection. Minority stockholder approval denied respondents the swift, sure and simple remedy of rescission of the merger or restitution of the fair value of their stock to which they were entitled in the absence of such approval. Minority stockholder approval also deprived re-

spondents of intra-corporate bars to consummation of the merger, which had been effective to block a similar transaction a year earlier.

ARGUMENT

I. PETITIONERS CANNOT SATISFY THEIR BURDEN UNDER *TSC INDUSTRIES* v. *NORTHWAY, INC.* OF SHOWING THAT THE MISSTATEMENTS WERE IMMATERIAL AS A MATTER OF LAW

The jury's verdict cannot be overturned unless petitioners show that, as a matter of law, the misstatements were so obviously unimportant or devoid of fact that no reasonable stockholder could have regarded them as untrue statements of material fact. *TSC Industries*, 426 U.S. at 4502. *See also Milkovich* v. *Lorain Journal Co.*, 110 S. Ct. at ——, 58 U.S.L.W. at 4851.

As shown in detail in the Government's Brief, the two misstatements at issue here were highly significant to stockholders. A board's statement of its reason with respect to a fundamental corporate change is an important representation, particularly where the reasons relate to a determination of value, a matter as to which the board has superior knowledge. *See Chris-Craft Industries* v. *Piper Aircraft Corp.*, 480 F.2d 341, 364-365 (2d Cir.), *cert. denied*, 414 U.S. 910 (1973).[6] A representation to minority stockholders that an investment banker's independent analysis supports an opinion by the banker that the transaction is fair to minority stockholders is a significant factor in a minority stockholder's analysis of the fairness of the price. *Herskowitz* v. *Nutri/System, Inc.*, 857 F.2d 179, 184 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 1315 (1989). Petitioners' contention that these matters have no significance to stockholders is belied by the extraordinary efforts to which FABI went to deceive minority stockholders about them.

[6] Petitioners seem to argue that a statement cannot be a material fact, rather than mere subjective opinion, unless it is specifically identified in the line item disclosure requirements of the pertinent proxy regulation. Pet. Br. 21. This argument is not only flatly erroneous; it trips over itself: as the Government's Brief points out, Item 14(a) of the pertinent FDIC regulation, 12 C.F.R. § 335.212 Item 14(a), required disclosure of the reasons for the merger. GB 10. *See also* Section 13(e)(1) of the Securities Exchange Act of 1934, 15 U.S.C. § 78m(e)(1) (authorizing SEC and FDIC to require disclosure of reason for going-private transaction). This disclosure, of course, must be truthful.

Affirmance of the judgment is required by application of well-established principles and requires no "expansion" of existing law. On the contrary, acceptance of petitioners' argument would gut existing disclosure requirements. If the factual representations at issue here can be characterized as no more than subjective opinion as a matter of law, the Court will have created an exception that swallows the rule and immunizes a vast category of highly significant representations from *both* public and private enforcement.

A. The Factual Representation That "The Merger Has Been Approved By The Board Of Directors Because It Provides An Opportunity For The Bank's Public Shareholders To Achieve A High Value For Their Shares" Was Misleading

The above-quoted statement was a plain, old-fashioned statement of fact, the truth of which was readily capable of proof or disproof. The proxy statement flatly asserted that the Bank's board had approved the merger because it provided public stockholders a high value for their shares. The board, in fact, never made such a determination, and the jury so found. In arguing that the representation is "subjective opinion," Pet. Br. i, 15, 16, 28, petitioners ignore the actual language of the proxy statement and base their argument on the repeated assertion that the representation was simply that the merger was "fair." *See, e.g.*, Pet. Br. 20. On its face, however, the statement submitted to the jury refers to an objective

event—formal action by the board to approve the merger because it offered minority stockholders a high value.[7]

Members of a board of directors "can act as a board only when assembled as a board, and by deliberate and concerted action dispose of the issue under consideration." 2 W. Fletcher, *Cyclopedia of the Law of Private Corporations* § 392 (1990).[8] Thus, a representation of board action warrants a reasonable investor to believe that such collective action—an objective event—took place. *See SEC* v. *Falstaff Brewing Corp.*, 629 F.2d 62, 75 (D.C. Cir.), *cert. denied*, 449 U.S. 1012 (1980); *Fradkin* v. *Ernst*, 571 F. Supp. 829, 846 (N.D. Ohio 1983). It is plainly a "fact" whether the board of directors actually approved a transaction *for the reason stated* in the proxy materials.[9]

Even where a representation contains some element of opinion, "expressions of 'opinion' may often imply an assertion of objective fact"—including the fact that the speaker actually holds the opinion expressed. *Milkovich*

[7] Thus, petitioners' reference to 11 dictionary definitions of "fair," Pet. Br. 22 n.15, is beside the point.

[8] The reason for the rule is that stockholders have a right to expect that board action be based on distillation of a collective judgment. *See* W. Fletcher, *supra*.

[9] Contrary to petitioners' contention, this is not a case in which the jury was permitted to hold the directors liable because it disagreed with the directors' view expressed in the proxy statement that the price offered for the shares was a "high value." Nor is the issue presented whether a representation that a price is "fair" can be attacked as false or misleading. The jury here was not instructed to consider whether "the statement that the directors recommended the merger as 'fair' * * * was false * * *." Pet. Br. 20. The issue presented to the jury was whether the picture painted to the shareholders—that the transaction was approved because it offered shareholders a "high value"—was false "because the claimed high values for the shares was not the reason for [the directors'] approval[.]" JA 421. The court of appeals expressly sustained liability on that basis. Pet. App. 15a-16a.

v. *Lorain Journal Co.*, 110 S. Ct. at —— n.7, 58 U.S.L.W. at 4751 n.7 ("[T]he statement, 'I think Jones lied,' may be provable as false on two levels. First, that the speaker really did not think Jones had lied but said it anyway, and second that Jones really had not lied"). The same principle applies in determining whether the antifraud rules of the securities law prohibit a particular misleading statement. When directors express their reasons for corporate action, shareholders naturally assume that the directors acted for the reasons stated. When they have not, the disclosure is misleading as to a material fact.

The common law has long recognized that the expression of an opinion that the speaker does not in fact hold may support an action for deceit, particularly when the speaker has superior access to information or stands in a fiduciary or trust relationship to the deceived party.[10] Directors, of course, stand in such a relationship to shareholders. Shareholders are plainly entitled to view judgments expressed in a proxy statement as accurately re-

[10] *See Vulcan Metals Co.* v. *Simmons Mfg. Co.*, 248 F. 853, 856 (2d Cir.) (L. Hand, J.) ("[T]he expression of an opinion is the assertion of a belief, and any rule which condones the expression of a consciously false opinion condones a consciously false statement of fact."), *cert. denied*, 247 U.S. 507 (1918); Restatement (Second) of Torts, § 525 (1976), comment d ("[s]trictly speaking, 'fact' includes not only the existence of a tangible thing or the happening of a particular event * * *, but also the state of mind, such as the entertaining of an intention or the holding of an opinion * * *"), and comment c ("a statement that a particular person * * * is of a particular opinion * * * is a misrepresentation if the person in question does not hold the opinion"); *id.* at § 542(b) (recipient of an opinion may be justified in relying on it if the fact to which the opinion relates is material and the speaker "stands in a fiduciary or other similar relation of trust and confidence to the recipient"); *see also* 2 F. Harper, F. James & O. Gray, *The Law of Torts* § 7.8, at 425-431 (2d ed. 1986) (noting that an opinion reflects a fact—the speaker's state of mind—and discussing factors that may expose the speaker to liability for misrepresenting his opinion, including the relationship between the parties and the information implicitly possessed by the speaker).

flecting the directors' views and resting on an investigation adequate to justify holding those views. *Cf. SEC* v. *Falstaff Brewing Corp., supra.* Given this common law background, the federal securities laws should not be read more restrictively, especially because they were intended to improve the protections afforded to investors. *Cf. Basic, Inc. v. Levinson*, 485 U.S. 224, 244 n.22 (1988); *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 388-389 (1983); *SEC* v. *Capital Gains Research Bureau*, 375 U.S. 180, 194-195 (1963).[11]

The evidence showed the inconsistency between the objective facts and the representation of those facts in the proxy statement, and fully supported the jury's verdict that the representation was a materially misleading statement of fact:

1. The language at issue was drafted by counsel for FABI six months before FABI disclosed its merger plan to the Bank's board of directors. JA 241, 318, 467, 479. As shown below, the board did not see or approve the proxy statement and never made the determination described therein.

2. The directors delegated the task of considering the merger proposal to a committee. Pet. App. 54a; JA 215, 232. The minutes of that committee's only meeting show no determination of the value of the stock, nor any decision to approve the merger because it offered a high value to minority stockholders. JA 450. The minutes state only that the committee approved a motion "to recommend to the Board of Directors at their meeting on February 12,

[11] The first amendment does not shield petitioners' false statements. The proxy statement is plainly commercial speech because, pursuant to the definition petitioners themselves recognize, it urged stockholders to approve a commercial transaction. *See Board of Trustees* v. *Fox*, 109 S. Ct. 3028, 3036 (1989); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976). In the commercial context, misleading or false statements can plainly be prohibited without running afoul of the first amendment. *See Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n*, 447 U.S. 557, 566 (1980).

1987 to accept the Holding Company's tender offer of $42 per share." *Id.*[12] No reason is stated.

3. Contemporaneous notes of the meeting, JA 451-457, show that the committee made no determination of high value. To the contrary, the notes show that the KBW representative who appeared at the meeting conceded that the market price was the "principal determinant" of the merger price, JA 454, even though the market was "not an open market," but one in which there was "little trading" and the "parent set the price." JA 452. Rather than obtaining a valuation of the stock, the participants in the meeting turned their discussion to "how to keep PR [public relations] afloat" and "how to prevent adverse reac. perception." JA 454.[13]

4. Relying on the committee's recommendation, the full board adopted a resolution drafted by counsel for FABI that the directors admitted was false. *See, e.g.*, JA 226, 251. The resolution recited that the directors had approved preliminary proxy materials presented to the meeting, JA 460, and that the merger was approved and found to be in the best interest of stockholders. JA 458. In fact, no proxy materials were presented to the meeting. JA 208, 226. *See also* Answers to Plaintiff's Third Set of Interrogatories to Director Defendants. The board was not shown—and did not approve, adopt or endorse—the six-month-old draft proxy statement, prepared by counsel for the other party to the transaction, that recited that the board had approved and was recommending the

[12] It has never been explained why the minutes refer to a "tender offer" to stockholders rather than a merger proposal.

[13] The committee considered obtaining a valuation of the minority stock, but was dissuaded from doing so when Beddow (in his dual role as FABI representative and Bank director) asserted that FABI would not pay a higher price than $42 per share even though an independent advisor determined that the stock was worth more than that amount. JA 261. The board's failure to determine the value of the stock at all is telling evidence that the board did not determine that the $42 price was a high value, as was misrepresented in the proxy statement.

merger because it provided a high value for the public stockholders. Moreover, the recitation in the resolution that the merger was found to be in the "best interests of First American Bank's shareholders" makes no reference at all to a high value, much less to the public (or minority) stockholders. The resolution is *entirely silent* as to why the merger was in the best interest of the public stockholders whose interest conflicted with that of the 85% stockholder who was taking their stock for $13 million less than what it was worth.

5. At trial, several directors admitted that *the board* approved the merger, not on the basis of any determination about the "opportunity" it provided for public shareholders to achieve a high value for their shares, but rather because *the board* believed it had no choice and would be replaced if it did not.[14]

Without a foundation in the language of the governing rule, petitioners argue that alleged difficulties in making accurate disclosure of reasons requires a judicially fashioned zone of immunity for such statements. But petitioners' purported policy considerations, Pet. Br. 22-29, are wholly insufficient to justify permitting directors blanket immunity for misstatements of reasons. Such a cramped view of the coverage of the proxy rules is an invitation to corporate deception, particularly in the freeze-out merger context. It would permit directors to agree among themselves that a price is low, or to make no judgment on the matter at all, and then inform shareholders that a transaction was approved because it represented a "high value," secure in the knowledge that federal law placed no constraints on their activities because they were simply expressing unverifiable "opinions." Such investor deception is diametrically opposed to the letter and spirit of federal law.

[14] For example, Director Dewberry conceded that the board approved the merger because it believed that it had "absolutely no other alternative * * * [t]here was nothing that we could do about it." JA 274. Director Michael admitted that the board believed that, if it did not approve the merger, FABI would replace it with a board that would. JA 281-282. Even chairman of the board Drewer conceded that the board "would have preferred to continue having minority stockholders." JA 213.

Requiring directors to be accurate when they disclose their purported reasons about such matters as the value of the corporation's stock does not present compliance or enforcement problems. Ordinarily, in a business context, directors of public companies articulate the considerations that prompt their action, and rely on written reports setting forth recommendations and supporting reasons. Certainly, drafting a proxy statement in light of the course of action on which directors have actually voted presents no great obstacle. Indeed, this case is anomalous in the directors' utter failure even to review the language in the proxy statement, or to have any idea of its contents, prior to authorizing it to be sent to shareholders. It is hardly surprising that a document drafted by the other party to the transaction months before the board meeting even took place is inaccurate. In the usual case, directors can easily read and agree upon proxy materials sent over their names. And corporate counsel, courts, and government agencies can compare the record of events surrounding the directors' determinations with the proxy statement's description of those events to determine whether disclosure is adequate and accurate.[15]

[15] It was precisely such a comparison that supported liability here. The jury, as it was entitled to do, obviously discounted the directors' self-serving explanations offered at trial in favor of the actual record of their actions: the directors declined to retain an investment advisor after being told that FABI would not make a higher offer regardless of an independent determination of value, *see supra* note 13; they acknowledged acting because FABI had the power to remove them from office, *supra* note 14; and they ultimately lent their names to a proxy statement that they never read or considered, *see supra* p. 17. Against that background, the jury had an ample, objective basis for finding that the proxy statement was false or misleading with respect to a "material fact."

Nor is a holding that liability was correctly imposed here inconsistent with federalism principles. Nothing in the decision below suggests that full disclosure of the directors' reasons would have subjected them to liability under federal law for having authorized a transaction deemed to be "unfair" under state law standards. *Cf. Santa Fe Industries* v. *Green*, 430 U.S. 462 (1977).[16]

Petitioners' solicitation of holders of securities registered under Section 12 of the Exchange Act [17] by means of a proxy statement containing misrepresentations of material fact triggered application of "the overriding federal law" requiring truthful disclosure *J.I. Case Co.* v. *Borak*, 377 U.S. 426, 434 (1964). A false representation to stockholders in a proxy statement implicates both the general "philosophy of full disclosure" underlying the Exchange Act, *Santa Fe*, 430 U.S. at 478, and the specific proscription of Section 14(a), and the rules issued thereunder, against soliciting stockholders of registered companies by deceptive representations.[18]

---

[16] Again, it is important to underscore that the court of appeals did not hold that liability attaches to a "fairness" opinion with which a jury later disagrees, or that "fairness" is a universally required element of disclosure. For that reason, the SEC's opinion in *Franchard Corp.*, 42 S.E.C. 163, 177-178 (1964) (addressing whether disclosure should generally be required in a prospectus with respect to directors' compliance with state law standards of responsibility) does not assist petitioners in defending their particular affirmative misrepresentations. Indeed, *Franchard* itself pointed out that the SEC has "required disclosures concerning directors' performance in situations * * * where the prospectus has made affirmative representations by which their performance could be tested." *Id.* at 178 (footnote omitted).

[17] 15 U.S.C. § 78*l*.

[18] Because Section 14(a) "is expressly directed at communications with existing shareholders with regard to matters to be voted on at the shareholder meetings," it will necessarily apply to conduct that may also constitute a breach of duty under state law. Hazen, *Corporate Chartering and the Securities Markets: Shareholder*

The decision below did not intimate that directors are *required* to disclose and explore their reasoning process in a proxy statement. But when directors do so, federal law requires materially accurate statements. As pointed out by the Government, liability was imposed on petitioners for *what they put in* the proxy statement—not for failure to comply with any claimed affirmative duty to disclose subjective motives. GB 9. The case is exactly like an earlier instance in which FABI drafted a decision-maker's reasons for action in advance of the actual events, and then disseminated a proxy statement presenting the fiction as fact:

> Once the proxy statement purported to disclose the factors considered by [the decision maker], there was an obligation to portray them accurately. The drafters of the proxy statement could not legitimately attribute to [the decision maker] factors which he did not actually consider, thereby making his decision appear well-informed, and then shield themselves by arguing that [the decision maker's] subjective motivations are not material.

Berg v. *First American Bankshares, Inc.*, 796 F.2d 489, 496 (D.C. Cir. 1986) (citations omitted).[19]

Suffrage, Corporate Responsibility and Managerial Accountability, 1978 Wis. L. Rev. 391, 402 (1978). The fact that the federal remedy for the federal violation is not subject to all of "the hurdles that the victim might face" under state law, *Borak*, 377 U.S. at 435, is not a reason to deny the federal remedy. Enactment of the Exchange Act was based on the failure of state law to provide the investor confidence essential to the health of the national economy. Seligman, *The Historical Need for a Mandatory Corporate Disclosure System*, 9 J. Corp. L. 1, 23 (1983). Petitioners' argument that state law hurdles should prevail over the congressional policy expressed in Section 14(a) ignores the constitutionally-mandated supremacy of federal law.

[19] None of the cases cited by petitioners sanctions the dissemination of a proxy statement attributing to the board a determination that the board did not make, or involves a false representation directly bearing on the value of the stock.

B. The Factual Representation That KBW Independently Passed On The Fairness Of The Merger To Minority Stockholders Was Misleading

Under this Court's decision in *TSC Industries* v. *Northway, Inc.*, it was the province of the jury to make the delicate assessments as to how the literal words of the proxy statement would be understood by the reasonable investor and to determine whether the statement so interpreted was materially false or misleading. *See also McMahan & Co.* v. *Wherehouse Entertainment, Inc.*, 900 F.2d 576 (2d Cir. 1990). The evidence presented at trial supported the jury in finding that the proxy statement's description of the role of KBW was a material misstatement of fact. The proxy statement said that KBW had been hired as "an independent investment banking firm, to pass on the fairness of the Merger," Pet. App. 38a, and that it had delivered "its written opinion as to the value to be ascribed to the estimated 15% of the shares of the Bank not owned" by FABI. *Id.* at 54a.

The jury was entitled to find that this language conveyed to a reasonable investor that KBW had independently analyzed the value of the Bank's stock and, on the basis of that valuation, had opined that the $42 price was fair to minority stockholders.[20] Indeed, this was the interpretation petitioners themselves urged to the jury:

---

[20] Although petitioners' liability with respect to the KBW representations does not rest solely on the use of the word "independent," petitioners' disavowal of the use of the word "independent" to connote "freedom from the influence of others," Pet. Br. 34, is contradicted by disclosures elsewhere in petitioners' own proxy statement. In another section, the proxy statement represented that the board of directors had not considered whether its accountant's "independence" might have been compromised by the Bank's prior retention of the accountant to perform a variety of professional services. Pet. App. 66a. The statement thus used the word "independent" to mean a party's judgment is not unduly influenced by others. *Cf. United States* v. *Arthur Young & Co.*, 465 U.S. 805, 819 n.15 (1984) ("Public faith in the reliability of a corporation's financial statements depends upon the public perception of the outside auditor as an independent professional. * * * If investors were to view the auditor as an advocate for the corporate client, the value of the audit function itself might well be lost").

1. The Bank's Chairman, Milton Drewer, who signed the proxy statement, believed that the proxy statement was accurate and that KBW had "come up with" the $42 merger price "on its own." JA 204-205.

2. FABI opened its case to the jury on this same basis, asserting that it had asked KBW "to tell it what would be fair to pay for the shares of the minority * * *." JA 99.

3. FABI's Beddow repeated this claim, stating that "we decided instead of our making up our mind what a fair price should be to the minority shareholders, we should engage Keefe, Bruyette ahead of time and *let them tell us* what was a fair price to the minority shareholders * * *." JA 319 (emphasis added). *See also* JA 72 ("KBW had *independently determined* what would be a fair price") (emphasis added).

4. Moreover, FABI's Treasurer, Vincent Scoffone, testified that FABI took pains not to reveal its desired price range to KBW, because to do so would taint or improperly influence KBW's "fair value opinion." JA 173-174.

But the evidence showed that the proxy statement's version of the facts was false:

1. In testimony as the Bank's representative pursuant to Federal Rule of Civil Procedure 30(b)(6), the President of FABI admitted that FABI's Executive Committee and Chairman had reached a "consensus" at $40-42 as the price it wanted to pay before KBW was contacted. JA 188-191.

2. KBW's Connor admitted that, notwithstanding FABI's claims at trial, KBW had been given the $40-42 price by Beddow "right from the beginning" of their discussions. JA 259-260. *See also* JA 320.

3. Connor's testimony further showed that KBW did not, as the proxy statement represented, "ascribe a value" of $42 to the minority shares. Because of his stated view that "any price above the market would be fair in our view," JA 347, Connor stated that "[i]t was not necessary to get to $42 from the standpoint of the company or from the standpoint of the shareholders *if we had been advising the shareholders* to accept that level. We chose $42 because in our view if you are going to make an offer that is fair, make the maximum number offer which you are prepared to make." JA 356-357 (emphasis added). Connor and KBW simply endorsed the $42 because it was the price FABI wanted to pay. *Id.*

4. KBW's effort to "value" the minority shares, reflected in KBW work papers containing an analysis of price to earnings ratios of the Bank and comparable institutions, produced a value of $60.53 per share, nearly 50% higher than the price for which FABI sought KBW's endorsement. JA 505 (10.4 regional price earnings ratio multiplied by $5.82 earnings estimate). KBW promptly abandoned that analysis of value in favor of its endorsement of "any price above the market" as fair. Moreover, Connor admitted that KBW made no attempt to determine whether the $42 per share that minority shareholders received was equal consideration for the stock that FABI received in the merger. JA 358-359.

5. Connor's testimony showed that KBW did not "pass on the fairness" of the $42 price to the minority shareholders. By attaching KBW's fairness opinion to the Bank's proxy statement, Pet. App. 74a, petitioners plainly conveyed to the minority shareholders the false and misleading impression that KBW was opining that the $42 price was fair to them.[21] In fact Connor disclaimed ren-

[21] KBW's opinion letter furthered the false impression that KBW was opining that the $42 price was fair to minority shareholders by artfully departing from the firm's consistent practice—evidenced by numerous other KBW fairness opinions introduced at trial, JA 132—of clearly stating *to whom* it believed the price was fair.

dering any such opinion. JA 356-357, 359. Connor testified, instead, that KBW opined that the transaction was fair to FABI, JA 359, and KBW's engagement letter (which was not attached to or described in the proxy statement) limited reliance on its opinion to FABI. JA 441-442.

Petitioners' impassioned argument that liability was imposed simply for using the adjective "independent" ignores the evidence summarized above and the fact that the jury was instructed to consider, not merely the word "independent," but the assertion that KBW had "passed on the fairness of the merger" for the benefit of minority stockholders. JA 422. The court of appeals correctly held that it was within the province of the jury to determine that the proxy statement reasonably conveyed the impression that KBW passed on the fairness of the merger on the basis of its independent anaiysis of the value of the stock, and that such impression was false. Pet. App. 16a.[22]

Petitioners argue that the proxy statement's standard recitation that the investment banker rendered its valuation on the basis of information provided by the company and did not attempt to verify that information independently, makes it "hard to imagine how the proxy statement could have been any more candid or explicit" about the role of KBW. Pet. Br. 33. But even this boilerplate disclosure implies, falsely in this case, that the investment banker made an independent valuation.[23] One

[22] The court of appeals' decision did not turn, as petitioners would imply, Pet. Br. 34, on any perceived failure to disclose KBW's contingent fee arrangement with FABI. To the contrary, the court merely cited that contingent fee as one explanation for KBW's ready willingness to accept the $42 price that its client, FABI, had suggested to it. Pet. App. 16a.

[23] Language of this kind routinely appears in KBW fairness opinions. See the samples introduced as Plaintiff's Trial Exhibit X, JA 132.

readily imagines a more candid proxy statement: one that disclosed that KBW had not valued the stock, had been given the $40-42 range in advance, and was not opining to minority stockholders that the merger was fair to them.

Petitioners' lament about hapless use of the word "independent" rings hollow because the instant proxy statement reflects calculated circumvention of specific requirements of applicable disclosure rules.[24] Nor is recovery here an "insurance scheme for investors." FABI (which is indemnifying the directors) is simply being required to restore the unjust benefit it obtained by using a false proxy statement to obtain respondents' stock for a payment far below its value.

C. The Proxy Statement Did Not Disclose All Material Facts With Respect To The Directors' Recommendation And KBW's Role

Petitioners failed to discharge their duty "to state [all] material fact[s] necessary in order to make the statement [respecting the board's recommendation and KBW's role] not false or misleading."[25]

---

[24] Items 9(b)(5) and (6) of Schedule 13E-3 required that the proxy statement state "whether the issuer or affiliate determined the amount of consideration to be paid or whether the [investment banker] recommended the amount of consideration to be paid" and further required a statement of "the bases for and methods of arriving at [the investment banker's] findings and recommendations" and any "instructions received from the issuer or affiliate * * *." 17 C.F.R. § 240.13e-100, Items 9(b)(5), 9(b)(6). The FDIC's policy at the time of the merger required petitioners to comply with Rule 13e-3 "in all material respects." *See* 45 Fed. Reg. 62,481-62,482 (1980) (proposed rule); 46 Fed. Reg. 25,205-25,206 (1981) (final rule). *See also* 12 C.F.R. § 335.409 (FDIC's current rule).

[25] 12 C.F.R. § 335.206(a); *see also* 17 C.F.R. § 240.14a-9 (SEC counterpart to FDIC rule). Petitioners recognized this duty in their proposed jury instructions. JA 412, 424. *See also Eisenberg* v. *Gagnon*, 766 F.2d 770, 776 (3d Cir.), *cert. denied*, 474 U.S. 946

1. The proxy statement implied that the board's determination that the $42 represented a high value was supported by the fact that the price was the product of "the negotiations in which the price per share to be paid was agreed on." Pet. App. 54a. In fact, there were no negotiations. JA 209-210.

2. The proxy statement represented that the $42 price represented a premium over book value, Pet. App. 54a, without disclosing that the appreciated value of the Bank's real estate (not reflected in book value) eliminated any premium over book value. JA 199-200, 280, 455.

3. The proxy statement represented that the $42 price was a premium over the market price, Pet. App. 53a-54a, without disclosing that KBW's concession that the market was thin, dominated by FABI, and "not an open market." JA 452.

4. The proxy statement represented that the $42 price was a premium over book value and market price, without disclosing going-concern value or the Treasurer's memorandum and KBW's work papers reflecting going-concern value in excess of $60. *See* JA 437-439; *supra*, p. 24.[26]

(1985); *First Virginia Bankshares* v. *Benson*, 559 F.2d 1307, 1317 (5th Cir. 1977), *cert. denied*, 435 U.S. 952 (1978); *Tanzer* v. *Haynie*, 405 F. Supp. 650, 654 (S.D.N.Y. 1976).

[26] *Howing Co.* v. *Nationwide Corp.*, 826 F.2d 1470, 1479 (6th Cir. 1987) (failure of proxy materials to provide reasonably detailed analysis of each of the financial evaluation methods discussed in Rule 13e-3, including going-concern value, prevented shareholders from having "the information necessary to make an informed decision * * *"), *cert. denied*, 486 U.S. 1059 (1988); *Meyers Parking Systems, Inc.*, Exchange Act Release No. 26,069, 41 SEC Docket 1061, 1064-65 (Sept. 12, 1988) (if a particular source of value referred to in Schedule 13e-3, such as going-concern value, was disregarded, disclosure document should state the reasons for disregarding it); Charles L. Ephraim, SEC No-Action Letter (Sept. 30, 1987) (because information "relating to the purpose for and fairness of the transaction * * * is particularly important to share-

5. Because of the board's access to information about the value of the minority stock that was not available to minority stockholders, the board's representation that the $42 price was a "high value" implicitly represented that the board had made a sufficient examination to form an honest opinion based on facts that the $42 price was a high value.[27] It was thus misleading to state that the price represented a high value without disclosing the board's specific determination not to obtain an independent valuation of the stock when told by FABI that it would not pay more than $42 even if such a valuation showed that price to be a low one.

Petitioners ignore the evidence supporting the jury's verdict, and content themselves with the idle rhetoric that, if the proxy statement were interpreted in the very benign respect in which petitioners see it—and not as the jury found it to be—two of the stockholders were not deceived by it. Pet. Br. 36-37.

This rehash of petitioners' reliance argument—rejected by the court of appeals and not even raised in the petition for certiorari—ignores the rule the jury determines whether a fact would be material to a reasonable investor. *TSC Industries*, 426 U.S. at 450. That petitioners did not succeed in fooling each and every stockholder is beside the point:

---

holders," reports and appraisals prepared in contemplation of the transaction and which relate to the purpose for, and fairness of, the transaction must be disclosed).

[27] *SEC* v. *Falstaff Brewing Corp.*, 629 F.2d at 75. *See generally Dan* v. *Avery*, 548 F.2d 1018, 1026-27 (D.C. Cir. 1976) (representation by fiduciary or one who has access to facts unavailable to listener may reasonably be understood not merely as opinion but as "assertion of fact upon which the recipient of the representation might prudently rely"), *cert. denied*, 431 U.S. 908 (1977); Restatement (Second) of Torts § 539 (1976) (representation by one with access to information not available to recipient may reasonably be understood as representing that the speaker has made a sufficient examination to form an honest opinion based on facts).

> It is abundantly clear that Congress' intent to protect the investing public would be seriously hampered if one who misuses the proxy process cannot be brought to task by those shareholders who have from the outset recognized his deceptions, but has only to fear that the other shareholders whom he has successfully beguiled will belatedly become enlightened and seek redress for the damage he has done them.

Corin v. *Bresler*, 741 F.2d 410, 427 (D.C. Cir. 1984) (Bork, J.) (quoting *Lynch* v. *Falks*, [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,831 at 90,134 (D. Kan. Dec. 12, 1980)).

II. THIS COURT SHOULD NOT CONSIDER THE CAUSATION ISSUES ASSERTED BY PETITIONERS BECAUSE THOSE ISSUES WERE WAIVED IN THE COURTS BELOW AND THE COURT OF APPEALS DID NOT DECIDE THEM

Petitioners never argued in either of the courts below that causation could not be shown where a stockholder owns sufficient stock to approve the merger. Indeed, their briefs in the Fourth Circuit did not even mention *Mills* footnote 7, now heralded as "famous" and dispositive. Petition at 20. Having solicited minority stockholder proxies, there were tactical and business reasons for petitioners not to claim that the solicitation of proxies was only an idle charade because their raw power entitled them to deceive with impunity.

Indeed, petitioners asked the jury to find that minority stockholder approval insulated the merger from an otherwise paralyzing conflict of interest. Petitioners thus were in no position to ask the jury to find that minority stockholder approval was unnecessary. They kept that argument in their back pocket until after respondents had expended enormous sums obtaining a verdict and its affirmance, and the judicial system had provided the resources for extensive pretrial procedures, a trial and an appeal. "Considerations of fairness to the court and

to the parties and of the public interest in bringing litigation to an end after a fair opportunity has been afforded to present all issues of fact and law" militate strongly against permitting petitioners to reverse their position at this late stage of the case. *United States* v. *Atkinson*, 297 U.S. 157, 159 (1936).[28]

In the courts below FABI and the directors filed separate answers, motions, and requests for instructions, and otherwise pursued their claimed separate interests separately. Neither set of defendants asserted the causation issue as a basis for a dispositive motion. Instead, the directors expressly conceded in their summary judgment motion that: "The notion of causation has been broadly defined in cases construing § 14(a). If the proxy solicitation is 'an essential link in the accomplishment of the transaction, causation may be established.' *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 385 (1970)."[29] The directors' motion for a directed verdict did not, as Federal Rule of Civil 50(a) requires, specifically raise the causation issue.[30] The directors did not object to any

[28] Pursuant to Supreme Court Rule 15.1, respondents' Brief in Opposition to the Petition alerted the Court to petitioners' waiver of the causation question. *See also Oklahoma City* v. *Tuttle*, 471 U.S. 808, 816 (1985). Although the decision to grant certiorari is made "with a view to deciding the merits" of the questions presented, *id.*, that decision does not foreclose further consideration of the waiver question. *See, e.g., City of Springfield* v. *Kibbe*, 480 U.S. 257 (1987). If it were otherwise, the Court would never decide the merits of a waiver question.

[29] Memorandum of Director Defendants' [sic] in Support of Motion for Summary Judgment, at 13.

[30] The directors were thus precluded from asserting causation as a basis for judgment notwithstanding the verdict by the fundamental rule that JNOV is only available on the specific grounds raised in support of the motion for a directed verdict. *See* Fed. R. Civ. P. 50(b) (JNOV motion is a "later determination of the legal questions raised by the motion" for a directed verdict); 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2537, at 598 (1971) (motion for JNOV "cannot assert a ground that was not included in the motion for a directed verdict").

jury instruction pertinent to causation."[31]

FABI's passing reference to footnote 7 of *Mills* in its motion for summary judgment was made in support of the argument that plaintiff's subjective reliance was a necessary element of her case—not that FABI's voting strength precluded an action under Section 14(a). *See* JA 75. It was *that* argument—and not a causation argument—that petitioners raised in the court of appeals.[32] The Fourth Circuit answered the question in the negative, holding that "reliance, even when the minority's voting strength is insufficient to halt a merger, is not an element of causation in a § 14(a) action." Pet. App. 14a. In a footnote, the court noted that "[i]t is conceded that the proxy statement was, under Virginia law, an essential link for accomplishing the merger." Pet. App. 13a n.1. *See* JA 250.

[31] The parties' objections to the jury instructions are found at JA 433-436. Messrs. Cawley and Sayers, of Hunton & Williams, spoke on behalf of FABI. Messrs. Stump, Murphy and Vieth, of McGuire, Woods, Battle & Boothe, spoke for the directors. Federal Rule of Civil Procedure 51 makes plain that "[n]o party" may challenge the giving of an instruction unless "that party" has properly objected thereto. Thus, the courts of appeals have held that each party wishing to pursue a challenge to jury instructions must itself have objected at trial. *See, e.g., Osterneck* v. *E.T. Barwick Indus.*, 825 F.2d 1521, 1532-1533 (11th Cir. 1987), *aff'd*, 489 U.S. 169 (1989).

[32] Petitioners presented the case to the court of appeals this way:

> This case presents a simple question for the Court. The question is whether a plaintiff who did not grant a proxy, who admitted she did not rely upon anything in a proxy statement, and who voted against the transaction for reasons unrelated to the proxy statement, can maintain a direct action for damages under Section 14(a).

Fourth Circuit Brief of Appellants First American Bankshares, Inc. and Virginia Bankshares, Inc., at 12.

The Court ought not assume that this cryptic reference by the court of appeals to a concession on an issue not raised in the briefs constituted a decision by the court of appeals warranting review by this Court. *City of Springfield* v. *Kibbe*, 480 U.S. at 259. Even if the Court were to assume that the court of appeals did consider the issue, review is not advisable here. *Id.* ("That the Court of Appeals was fortunate enough to entertain the issue * * * would not justify our running the same risk" of reversing a judgment because of instructions petitioner accepted). Unlike the situation in *Oklahoma City* v. *Tuttle*, 471 U.S. at 815, the issue was not fully briefed and argued in the court of appeals. Nor was the question "very clearly considered, and decided, by the Court of Appeals," as in *City of St. Louis* v. *Praprotnik*, 485 U.S. 112, 120 (1988). And, petitioners' protestations notwithstanding, the legal issue now raised is not "in a state of evolving definition and uncertainty" requiring this Court's intervention," as in *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 256 (1981).[33] The fortuity that the court of appeals repeated petitioners' concession should not be a basis for reviewing the jury's verdict on grounds not asserted in either the district court or the court of appeals. To allow review on such a fortuity would be imprudent and unjust.[34]

The Court should not review the causation issues for the additional reason that doing so would reward and

[33] There has been no conflict among the circuits on the question. *See* GB at 22 n.34.

[34] Petitioners chastise the court of appeals for failing to decide issues petitioners did not present, or for imprecision in the language of its opinion. Yet this court sits to review judgments, not opinions. *Rogers* v. *American Hospital Ass'n*, 476 U.S. 610, 625 n.11 (1986) (Stevens, J., plurality opinion). *See also Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984); *Block* v. *Cutter Laboratories*, 351 U.S. 292, 297 (1956); *Herb* v. *Pitcairn*, 324 U.S. 117, 126 (1945) ("our power is to correct wrong judgments, not to revise opinions").

encourage faithlessness to the record of the kind exhibited here. For example, although the district court gave the proximate cause instruction requested by petitioners, JA 83, 92, 424, petitioners tell this Court that "the jury was never asked to find any causal link." Pet. Br. 17. Similarly, petitioners fault the district court for not giving a causation instruction they never sought. Pet. Br. 48. The fact that petitioners never advanced their preclusive causation argument to the court of appeals explains why the court of appeals did not discuss it. Yet petitioners characterize the court of appeals' silence as a holding that "dispensed with the requirement of proof of causation," Pet. Br. 17, and go so far as to assert that the court of appeals' silence "acknowledged" that respondents could not demonstrate causation. *Id.* Such uses of the silence resulting from petitioners' own failure to raise issues below make plain the wisdom of refusing to allow petitioners to raise those issues now.

III. THE JURY'S VERDICT THAT THE DECEPTIVE PROXY SOLICITATION CAUSED RESPONDENTS' INJURY SHOULD BE AFFIRMED BECAUSE THE ISSUE WAS SUBMITTED TO THE JURY ON CORRECT INSTRUCTIONS AND THE EVIDENCE SUPPORTED THE VERDICT

A. The Court Should Reject Petitioners' Preclusive Causation Argument

In *Mills* v. *Electric Auto-Lite Co.*, this Court held that "[w]here there has been a finding of materiality, a shareholder has made a sufficient showing of causal relationship between the violation and the injury for which he seeks redress if, as here, he proves that the proxy solicitation itself, rather than the particular defect in the solicitation materials, was an essential link in the accomplishment of the transaction." 396 U.S. at 385.[35]

[35] The Court adopted "[t]his objective test" because it "will avoid the impracticalities of determining how many votes were affected,

In *Mills*, the proxy solicitation was an essential link in the accomplishment of the transaction because the defendants, who controlled 54% of the outstanding shares, needed a two-thirds vote to approve the merger. In footnote 7 of its opinion, the Court said that:

> We need not decide in this case whether causation could be shown where the management controls a sufficient number of shares to approve the transaction without any votes from the minority. Even in that situation, if the management finds it necessary for legal or practical reasons to solicit proxies from minority shareholders, at least one court has held that the proxy solicitation might be sufficiently related to the merger to satisfy the causation requirement, see *Laurenzano* v. *Einbender*, 264 F. Supp. 356 (D.C. E.D.N.Y. 1966); * * *.

Id. at 385 n.7.

Petitioners urge the Court to resolve this question by adopting a procrustean rule that would preclude minority stockholders from proving that a deceptive proxy statement caused them injury, even though (1) minority stockholder approval was necessary to accomplish the transaction at issue, or (2) injury otherwise flowed directly from the statutory violation.

The Government's Brief demonstrates that a variety of injuries might flow directly from a deceptive proxy statement in these circumstances, and explains why these injuries should not be denied redress by a rule that precludes a showing of causation as a matter of law. We join in the Government's arguments against such a rule.

The error of petitioners' position is particularly egregious in situations where, because of the circumstances of the particular case, minority stockholder approval is

---

and, by resolving doubts in favor of those the statute is designed to protect, will effectuate the congressional policy of ensuring that the shareholders are able to make an informed choice when they are consulted on corporate transactions." 396 U.S. at 385.

necessary to accomplish the transaction even though a stockholder controls sufficient votes to grant itself the margin of approval normally required for such a transaction. For example, the votes of minority stockholders may be necessary to ratify action by the board of directors that is voidable because a conflict of interest infects the board's action.[36] In such circumstances, the votes of a majority of the minority stockholders are necessary to accomplish the transaction and thus the proxy solicitation is just as necessary as was the solicitation in *Mills*. Soliciting those votes by means of a materially misleading proxy statement causes an injury to minority stockholders that flows directly from the statutory violation and is plainly within the ambit of injuries against which the statute was designed to protect. As shown *infra*, pp. 43 to 44, just such injury was proved here.

Similarly, minority stockholders' injury may flow directly from the use of a deceptive proxy statement where a controlling stockholder determines that it will not compel a freeze-out merger unless it is approved by minority stockholders. In that circumstance, the votes of the minority stockholders are again necessary to accomplish the merger, and a deceptive proxy statement injures rights protected by Section 14(a).[37] Again, as shown *infra*, pp. 45 to 46, this injury was also shown here.

---

[36] *See, e.g., Robbins* v. *Banner Indus.*, [1967-1969 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,309 at 97,467 (S.D.N.Y. Nov. 27, 1968) (causation shown with respect to proxy statement seeking approval of issuance of stock to directors at inadequate price because the votes of minority stockholders, although not necessary to approve the self-dealing transaction, were necessary to ratify it).

[37] *See, e.g., Efros* v. *Nationwide Corp.*, [1982-1983 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 99,077, at 95,119 (S.D. Ohio Jan. 17, 1983) (parent reserved the right to cancel merger if a majority of minority stockholders voted against it). "It has become a standard practice to make buyouts contingent on approval by a majority of the shareholders who are to be bought out." Booth, *Management Buyouts, Shareholder Welfare, and the Limits of Fiduciary Duty*, 60 N.Y.U. L. Rev. 630, 657 (1985).

The Government demonstrates at pages 24-26 of its brief that there are a variety of other instances in which minority stockholder injury results from a false proxy statement's "distortion of the voting process," even though a single stockholder owns sufficient stock to grant itself the margin of approval normally required for the transaction. These circumstances need not be addressed in this case because respondents proved that minority stockholder approval was necessary to accomplish the transaction and thus showed precisely the kind of injury involved in *Mills*. Nonetheless, the Court should be loathe to adopt a rule that forever forecloses consideration of claims arising out of all such circumstances.

Petitioners' contrary argument assumes that minority stockholders are, like tender offerors with respect to Section 14(e), "outside the scope of the concerns articulated in the evolution of [the] legislation." *Piper* v. *Chris-Craft Industries*, 430 U.S. 1, 33 (1977). *See* Pet. Br. 42. Neither the text of Section 14(a) nor its legislative history so suggests.

As the court said in *Cowin* v. *Bresler*, 741 F.2d at 427 (Bork, J.), there is no basis or need for judicial restriction, on the class of potential plaintiffs under Section 14(a) because "the conduct proscribed in the statute—deceptive proxy solicitations—is itself a means by which the plaintiff class is defined and restricted." *Id.* at 426 n.21. The taking of minority stock at an inadequate price pursuant to a false proxy statement is within the scope of injury contemplated by Section 14(a). *Id.* at 428.[38]

[38] Contrary to the assertion at page 43 of petitioners' brief, Professor Hazen was not addressing the application of Section 14(a) when he questioned whether "recent corporate mismanagement cases under rule 10b-5" are consistent with this Court's concern of freeing the federal courts from claims based on state law breaches of fiduciary duty. *See* 1 T. Hazen, *The Law of Securities Regulation* 669-670 (2d ed. 1990). Petitioners ignore Professor Hazen's—and this Court's—insistence on the need for careful distinction between Sections 10(b) and 14(a). *See Basic, Inc.* v. *Levinson*, 485 U.S. at 243; Hazen, *supra* note 18, at 418, 425.

The legislative history so demonstrates. "Section 14(a) stemmed from the congressional belief that '[f]air corporate suffrage is an important right that should attach *to every equity security* bought on a public exchange' H.R. Rep. No. 1383, 73d Cong., 2d Sess., 13 (1934)." *Mills*, 396 U.S. at 381.[39] The congressional purpose includes concern that stockholders be adequately informed about corporate activities, especially conflict of interest transactions.[40] *See Cowin* v. *Bresler*, 741 F.2d at 427; *Schlick* v. *Penn-Dixie Cement Corp.*, 507 F.2d 374, 383 (2d Cir. 1974), *cert. denied*, 421 U.S. 976 (1975).

Petitioners recognize that the right to "fair corporate suffrage" protected by Section 14(a) encompasses "corporate debate" and "corporate democracy"—a system in which minority stockholders can cause modification or withdrawal of a proposed merger by reasoned argument grounded in truthful disclosure. Pet. Br. 28. That is why, as explained in the principal case cited in footnote 7 of *Mills*, it is not "to be *assumed without evidence* that the solicitation of proxies was a gratuitous and, therefore, purposeless and legally inert act." *Laurenzano* v. *Einbender*, 264 F. Supp. 356, 361-362 (E.D.N.Y. 1966).[41]

[39] Section 14(a) now applies as well to securities, like those at issue here, registered under Section 12 of the Exchange Act, 15 U.S.C. § 78*l*. Section 14(a) continues to differ from Section 10(b), which applies to all securities without limitation.

[40] *See* S. Rep. No. 1455, 73d Cong., 2d Sess. 74 (1934) ("In order that the stockholder may have adequate knowledge as to the manner in which his interests are being served, it is essential that he be enlightened * * * as to the major questions of policy, which are decided at stockholders' meetings."); H.R. Rep. No. 1383, 73d Cong., 2d Sess. 14 ("Insiders have at times solicited proxies without fairly informing the stockholders * * * and have used such proxies to take from the stockholders for their selfish advantage valuable property rights"). *See also* S. Rep. No. 1455, 73d Cong., 2d Sess. 77 (1934).

[41] *Accord Swanson* v. *American Consumer Indus.*, 415 F.2d 1326, 1332 (7th Cir. 1969) ("[w]e are not prepared to sanction

Whether petitioners' violation of respondents' voting rights caused respondents' injury should not be foreclosed as a matter of law simply because of FABI's stock ownership.

B. The Causation Issue Was Submitted To The Jury On Proper Instructions In Which All Of The Parties Concurred

In submitting the causation question to the jury, the district court instructed—as all the parties requested—that the plaintiff was required to show that petitioners' conduct with respect to the proxy statement was a substantial factor in causing her injury, and that the injury was a direct result or a reasonably probable consequence of petitioners' act or omission. JA 424. The jury was also instructed—again at the request of all parties—that the plaintiff was not required to prove subjective reliance if she proved that the proxy statement was an "essental link" in accomplishing the merger, and that the jury could find that the proxy solicitation was an essential link if it was necessary for the Bank to solicit proxies from minority stockholders. JA 420, 426; *see also* JA 81-82, 91.

These instructions were plainly correct.[42] The district court's proximate cause instruction, requested by petitioners, JA 83, 92, was substantially the same as that applied to a private action for damages caused by a misleading proxy statement in the American Law Institute's *Federal Securities Code*.[a] The "no reliance necessary" instruction accurately stated the doctrine of *Mills* and of *Basic, Inc.* v. *Levinson*, 485 U.S. at 243, that a plaintiff in a Section 14(a) case need not prove subjective reliance if the proxy solicitation was an essential link in the transaction.

Finally, the court's instruction accurately stated the law that a proxy solicitation is an "essential link" where the votes solicited are necessary to accomplish the transaction. This is the only point on which the Government and respondents part company. The Government apparently believes that the instruction permitted the essential link finding to rest, as the court of appeals' footnote arguably did, Pet. App. 13a n.1, solely on a state-law requirement that a notice of meeting or information statement be issued. Respondents believe that is *not* the case because the instruction defined essential link in terms of whether it was *necessary* to *solicit* proxies from minority shareholders, thus requiring that the votes were necessary to accomplish the transaction. The Government's Brief assumes—erroneously, we believe—that minority stockholder approval cannot be "necessary" if the controlling stockholder has votes sufficient to grant itself the margin of approval normally required for the transaction. The evidence here showed, however, and the jury found that minority stockholder approval was necessary

---

a rule of causation which would presume that full disclosure to minority shareholders could have no transactional function in corporate affairs"); *Schlick* v. *Penn-Dixie Cement Corp.*, 507 F.2d at 384 ("[w]e cannot assume that even a rapacious controlling management" would not modify or reconsider the terms of a merger as a result of truthful disclosure). Petitioners focus their attack on the Second Circuit's decision in *Schlick*. For the reasons explained in the text, we submit that *Schlick* correctly held that the mere fact that a controlling stockholder can grant itself stockholder approval of the merger does not preclude an action under § 14(a). This case, however, is squarely within the rule of *Mills* because minority stockholder votes were necessary.

[42] The director defendants offered no objection whatsoever to the district court's causation instructions. *See supra* note 31. FABI concurred in giving the proximate cause instruction and in defining essential link in terms of a need to solicit proxies. JA 82. Petitioners are thus barred from claiming error in instructions to which they did not object. Fed. R. Civ. P. 51.

[a] The Code, for which Professor Loss served as the Reporter, requires proof that the loss "is 'caused' by specified conduct to the extent that (A) the conduct was a substantial factor in producing the loss, and (B) the loss was of a kind that might reasonably have been expected to occur as a result of the conduct." American Law Institute, *Federal Securities Code* § 202(19) (1980).

to ratify otherwise voidable board action and to satisfy a condition of the merger. *See infra* pp. 43-46.

Even on this point, however, the Government recognizes that the judgment may not depend on the validity of the "no reliance necessary" instruction. GB 28. We believe it does not because the jury was required to read that instruction together with the proximate cause instruction, which required a showing that petitioners' conduct with respect to the deceptive proxy statement injured minority stockholders in a way that flowed directly from or was a reasonably probable consequence of petitioners' conduct."[44]

Moreover, the Government explicitly takes no position as to whether the point was properly preserved. GB n.49. In fact, it was not. The directors did not object to the instruction at all, and FABI concurred in defining essential link in terms of whether it was necessary to solicit proxies. JA 81-82.

Although they never requested it to do so, petitioners now argue that the district court should have instructed the jury that the plaintiff was required to prove that she would have succeeded in preventing the merger if petitioners had made truthful disclosure in the proxy statement. Pet. Br. 46.[45] Petitioners' argument should be rejected because the district court was not required to enumerate factors that might defeat proximate causation, *Van Buskirk* v. *Carey Canadian Mines, Ltd.*, 760 F.2d 481, 494 (3d Cir. 1985), or to particularize ways in which proximate causation might be shown. *Merrick* v. *Farmers Insurance Group*, 892 F.2d 1434, 1442 (9th Cir. 1990).

[44] The jury was specifically instructed, in accordance with the controlling legal principle, *see, e.g., United States* v. *Park*, 421 U.S. 658, 674 (1975), that "[y]ou are not to single out one instruction alone as stating the law, but should consider the instructions as a whole." Fourth Circuit JA 1707.

[45] This argument, which is based on Rule 10b-5 cases where stockholder proxies were neither necessary nor solicited, ignores the holding of *Mills* that where, as here, the solicitation is necessary to accomplish the transaction, the plaintiff is required only to show the existence of material misstatements and need not show that "the defects actually had a decisive effect on the voting." 396 U.S. at 385.

The cases cited by petitioners differ from this case because they involved claims of injury other than interference with a proxy solicitation. The case now principally relied on by petitioners, *Madison Consultants* v. *FDIC*, 710 F.2d 57 (2d Cir. 1983), suggests that, in such cases, (1) a misstatement is material if the plaintiff can prove that he or she had some available "means of self-protection," *id.* at 64, and (2) causation could be established by proof that defendant's wrong proximately caused plaintiff's failure to obtain the claimed means of self-protection. *Id.* at 65.[46] *See also Santa Fe Industries* v. *Green*, 450 U.S. at 474 n.14 (allegedly deceptive failure to give advance notice of Delaware short form merger not material because appraisal proceeding sole remedy under Delaware law). In this case, however, petitioners concurred in defining materiality in terms of significance to a reasonable stockholder's decision as to how to vote.[47]

Petitioners' own cases make clear that, even where the injury is that defendant's deception prevented plaintiff from pursuing an available means of self-protection, a general proximate cause instruction such as the one given in this case adequately instructs the jury as to causation. The one case cited by petitioners that involved

[46] Judge Mansfield's opinion makes clear that "[t]his standard" does not obligate a plaintiff to prove beyond a reasonable doubt or to an absolute certainty" that he would have achieved his means of self-protection; he needs "to prove only by a fair preponderance of the evidence that he would have succeeded." 710 F.2d at 65.

[47] Petitioners did not object to the instruction at JA 129 and proposed a similar instruction themselves. *See* JA 91.

instructions, *Healy* v. *Catalyst Recovery of Pennsylvania, Inc.*, 616 F.2d 641, 648-649 & n.5 (3d Cir. 1980), held just that. And, as noted, the ALI has endorsed such an instruction in its Federal Securities Code. *See supra* note 43. As shown below, the evidence here showed that petitioners' deceptive proxy solicitation proximately caused respondents' loss of available means of self-protection because the minority stockholder approval thereby obtained (1) prevented respondents from obtaining the rescission or restitution of the fair value of their stock, to which they were entitled in the absence of such approval; and (2) denied respondents the intra-corporate protection against completion of the merger that would have resulted from disapproval of the merger by minority stockholders.

Finally, petitioners' argument that truthful disclosure could not possibly have provided a basis for enjoining the merger is at once irrelevant and self-defeating. It is irrelevant because respondents proved injury to their voting rights, not injury to their ability to bring a lawsuit; there was *no* proof by any party at trial about ability to obtain or not obtain an injunction. It is self-defeating because the verdict below establishes that respondents were able to show the falsity of petitioners' representations respecting the merger once they were able to pierce behind the deceptive proxy statement. In other words, truthful disclosure *would* have provided exactly the ammunition respondents needed but were denied by the deceptive proxy statement, but that is not the injury respondents proved here.[48]

[48] The state court dismissed the complaint on its face, prior to any discovery, on the ground that there was no equitable appraisal remedy, but granted leave to amend to file an action at law. As the court of appeals held was entirely proper, a new action was instituted in federal court following consummation of the merger. Pet. App. 24a-25a.

C. The Evidence Of Causation Supported The Verdict

Petitioners' final causation argument is that respondents' proof of causation was insufficient. This argument was waived by petitioners' failure to move for a directed verdict on that ground or to raise the point in the court of appeals.[49] In any event, petitioners could overturn the jury's verdict only if they could show that there was no evidentiary basis for the verdict. *Lavender* v. *Kurn*, 327 U.S. at 653 (1946). Such a showing cannot be made here; there was ample basis for the verdict.

The evidence showed that it was necessary to solicit proxies from minority stockholders for two reasons. First, petitioners themselves asked for and received a jury instruction which showed that petitioners were relying on approval by minority stockholders to cure the fundamental defect in the merger created by director Beddow's conflict of interest. Petitioners conceded to the jury that FABI director Beddow acted as a representative of FABI on the Bank's board, and that his participation as a director of the Bank in the Bank board's approval of the merger created a conflict of interest. Fourth Circuit JA 1093-1094.

Under Virginia law and the specific terms of the Virginia director conflict of interest statute, Va. Code Ann. § 13.1-691, the Bank board's approval of the merger was voidable unless the material facts concerning the merger and Beddow's interest were disclosed to and approved by either the board of directors or the minority stockholders, or there was a judicial determination that the merger was fair to minority stockholders. Unless the defect caused by the conflict of interest was cured, the merger was void-

[49] The evidence is not reviewable on appeal unless a motion for a directed verdict on that ground was made in the trial court. *See Meriwether* v. *Coughlin*, 879 F.2d 1037, 1044 (2d Cir. 1989) (appellate review available only on the specific ground stated in the motion); 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2536, at 593.

able without any showing of harm at the suit of any minority stockholder, (*id; Kessler* v. *Commonwealth Doctors' Hospital, Inc.*, 212 Va. 497, 503, 185 S.E.2d 43, 47 (1971); 3 W. Fletcher, *supra*, § 917), and was also subject to suits by individual stockholders for restitution of the fair value of their stock. *Rowland* v. *Kable*, 174 Va. 343, 370, 6 S.E.2d 633, 644 (1940).

The board that "exercised no independent judgment whatsoever" with respect to the merger but "merely rubber-stamped everything placed before them" by FABI's Beddow, Pet. App. 19a, plainly could not exercise the independent judgment needed to cure the conflict. *Borden* v. *Sinskey*, 530 F.2d 478, 494-495 (3d Cir. 1976); *Dasho* v. *Susquehanna Corp.*, 461 F.2d 11, 26 (7th Cir.), *cert. denied*, 408 U.S. 925 (1972).[50] Initiating an action to obtain a judicial determination of the fairness of the merger was suicidal; as shown by the jury's specific finding below, and suggested by FABI's own internal study, the stock taken for $42 had a value of $60. JA 437-439; 527. Accordingly, the only method of making the merger effective was to obtain minority stockholder approval of the transaction.

Petitioners graphically showed the jury that the minority votes they solicited were not superfluous by asking for and receiving a jury instruction that Virginia's prohibition of director conflict of interest did not apply to the merger if the jury found that "*the minority stockholders of the First American Bank * * * approved of the merger* * *." JA 431 (emphasis added). Thus, the votes of minority stockholders were necessary—and urgently solicited—to ratify the otherwise voidable acts of the board respecting the merger and eliminate the right of minority stockholders to restitution of the $60 value of their stock taken in the merger.

---

[50] Moreover, there was not full disclosure to the board. For example, the board was falsely told that KBW had originated the $42 merger price when, in fact, it had not. JA 204-205.

The evidence also showed that minority stockholder approval was necessary to satisfy a condition established by FABI. The evidence showed that FABI had determined that it was not prepared to suffer the harmful business effects of widespread opposition by stockholders—many of whom were Bank customers—to the use of raw economic power to take the minority's stock at an unfair price and that, accordingly, it would not compel the merger unless it was approved by the minority stockholders. FABI admitted at trial that it sought "a friendly transaction," which required a price viewed as "so high that any reasonable shareholder will accept it." JA 99. Petitioners' business goals required a transaction that would result in "no loss of support for the bank out in the community, which was important." JA 109. FABI thus sought to insure that the Virginia stockholders would "respond favorably to [the $42] price," JA 192, by means of a proxy solicitation designed to convince minority stockholders that the $42 price was a high value.

FABI told KBW's Connor that FABI wanted its price to "be *deemed to be* fair by the minority shareholders," JA 341 (emphasis added). As Connor said, FABI wanted to "*show those minority shareholders* that we [FABI] are being fair * * *." JA 347 (emphasis added). Accordingly, Connor met with a group of the Bank's directors (whom FABI regarded primarily as stockholders for this purpose, JA 192) to "make a case for the $42 price," JA 276, as part of an effort to test the water to see if stockholders generally would accept the $42 price without resistance. JA 353. Discussion focused on the need for minority stockholders to support the taking of their stock at the $42 price: as notes of the meeting put it, "how to keep PR [public relations] afloat" and "how to prevent adverse reac[tion] /perception." JA 454.

In view of the admitted need for a favorable response from minority stockholders, the jury was justified in concluding that when FABI's chairman said that the Bank's

board would "have to go to the stockholders * * * for *their* approval," he was not referring to his own approval as the agent of the 85% stockholder, but rather to approval by the 15% minority whose proxies FABI urgently solicited.[51] The directors admitted in the district court that their approval of the merger was made in the context of submitting it to stockholder "ratification," presumably by stockholders other than the one seeking the merger. Memorandum of Director Defendants' [sic] in Support of Motion for Summary Judgment, at 7.

If petitioners' solicitation of proxies from minority stockholders was undertaken for any reason other than the need "*for their approval*," the pertinent evidence was within petitioners' control, but not adduced at trial. Petitioners had every opportunity at trial, and control over the pertinent witnesses, to introduce evidence that their urgent solicitation of minority stockholder votes was unnecessary because FABI intended to force the merger on minority stockholders even if a majority of them failed to respond to the urgent solicitation of their votes. Petitioners introduced no such evidence, and made no such argument at trial. In these circumstances, "[s]ilence then becomes evidence of the most convincing character." *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208, 226 (1939).

Moreover, the evidence showed that opposition to FABI's price had blocked its attempt, just a year earlier, to acquire the minority stock of its Maryland subsidiary, and that such opposition had developed when the board of the Maryland bank retained an investment advisor, who determined that FABI's price was inadequate. *See supra*, p. 4. FABI insisted at trial that its business con-

[51] FABI was not committed to the merger until after it knew the results of the proxy solicitation. The merger agreement effectively gave FABI an option by making the agreement contingent on approval of two-thirds of the stockholders. JA 463. FABI did not commit itself to vote its shares in favor of the merger but only stated its intent to do so. Pet. App. 37a, 45a.

sideration required a "friendly transaction," and Chairman Drewer testified that the Virginia board would not have consummated the merger if the price had been shown to be unfair.[52] JA 229. The jury was entitled to find that truthful disclosure would again have demonstrated the gross inadequacy of FABI's price and again halted the merger.

The evidence also showed that the deceptive proxy statement caused respondents to lose another means of self-protection—a suit for restitution of the value of the stock taken in the merger—on which minority stockholders would have prevailed on the basis of the *admitted* conflict of interest (Fourth Circuit JA 1094; *see* JA 527) and proof that, as the jury found, their stock was worth $60. Thus, even under the terminology preferred by petitioners, the evidence supported a verdict that petitioners' deceptive proxy statement proximately caused respondents' loss by depriving them of remedies to which they were clearly entitled in the absence of minority stockholder approval.

While some "measure of speculation and conjecture" is inevitable, the jury's verdict is infirm only where its conclusion has no evidentiary basis. *Lavender* v. *Kurn*, 327 U.S. at 653.[53] There was an ample—and unchallenged—evidentiary basis here for the jury's verdict for respondents.[54]

[52] As noted above, Virginia law permits the board to decline to consummate a merger after stockholder approval.

[53] *See Dasho* v. *Susquehanna Corp.*, 461 F.2d at 28 (Stevens, J.) (proof as to what exchange ratio would have been in the event of truthful proxy statement disclosure can be adequately established under "the same standards that juries employ to determine comparable issues in other complex commercial litigation * * *").

[54] In the event of any disposition other than affirmance or dismissal of the writ, the Court should remand to the court of appeals for a determination, sought by respondents' cross-appeal, but not reached because of the court of appeals' affirmance, that hand-

CONCLUSION

For the reasons stated herein, the Court should affirm the judgment of the court of appeals. Alternatively, the Court should dismiss the writ of certiorari as improvidently granted because the record does not present the issues framed by petitioners.

Respectfully submitted,

JOSEPH M. HASSETT *
JOHN C. KEENEY, JR.
GEORGE H. MERNICK, III
DAVID G. LEITCH
ALBERT W. TURNBULL
GREGORY A. KALSCHEUR
HOGAN & HARTSON
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5643

* Counsel of Record

Counsel for Respondents

---

written notes of a meeting between FABI official Altman and the Bank's Chairman Drewer on the day before the stockholders' meeting (which were produced by the directors, but then reclaimed pursuant to a belated claim of privilege) were not subject to a valid claim of privilege. The notes at issue are found in the sealed appendix filed in the Fourth Circuit. Information contained in the notes, and to be obtained through inquiry based on the notes, is highly pertinent to causation and other issues as outlined by respondents in the court of appeals. There are other issues not yet passed upon by the court of appeals. *See* Pet. 16a n.3.

Supreme Court, U.S.
FILED
AUG 24 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1448

In the Supreme Court of the United States

OCTOBER TERM, 1990

VIRGINIA BANKSHARES, INC., ET AL., PETITIONERS,

v.

DORIS I. SANDBERG, ET AL., RESPONDENTS.

FIRST AMERICAN BANKSHARES, INC., ET AL., PETITIONERS,

v.

PAUL H. WEINSTEIN, ET AL., RESPONDENTS.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR THE PETITIONERS

JOHN S. STUMP
McGuire, Woods, Battle & Boothe
8280 Greensboro Drive
Post Office Box 9346
McLean, VA 22102

LEWIS T. BOOKER
Hunton & Williams
707 East Main Street
Post Office Box 1535
Richmond, VA 23212

STEPHEN M. SHAPIRO
Counsel of Record
ANDREW L. FREY
KENNETH S. GELLER
LAWRENCE C. MARSHALL
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 463-2000

Counsel for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
I. RESPONDENTS FAILED TO PROVE THAT THE PROXY STATEMENT CAUSED THEM ANY INJURY	1
A. The Causation Issue Has Not Been Waived	2
B. Respondents Never Alleged Or Proved Any Causal Connection Between The Purported Defects In The Proxy Statement And The Consummation Of The Merger	4
1. The "Conflict-Of-Interest" Theory	5
2. The "Implied Condition" Theory	9
II. THE PROXY STATEMENT DID NOT CONTAIN ANY MATERIAL MISREPRESENTATIONS OF FACT	11
A. The Directors' Reasons For Recommending The Transaction	11
B. The Evaluation By The Independent Investment Banking Firm	17
CONCLUSION	20
APPENDIX	1a

TABLE OF AUTHORITIES

CASES:	Page
Backman v. *Polaroid Corp.*, No. 89-1171 (1st Cir. Aug. 2, 1990)	20
Bigelow v. *Virginia*, 421 U.S. 809 (1975)	11
Blue Chip Stamps v. *Manor Drug Stores*, 421 U.S. 723 (1975)	18
Brunswick Corp. v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977)	11
Dirks v. *SEC*, 463 U.S. 646 (1983)	18
Ernst & Ernst v. *Hochfelder*, 425 U.S. 185 (1976)	11, 18
Francis v. *Franklin*, 471 U.S. 307 (1985)	7
Haynes v. *United States*, 390 U.S. 85 (1968)	11
J.I. Case Co. v. *Borak*, 377 U.S. 426 (1964)	4
Kas v. *Financial General Bankshares, Inc.*, 796 F.2d 508 (D.C. Cir. 1986)	12
Matsushita Electric Industrial Co. v. *Zenith Radio Corp.*, 475 U.S. 574 (1986)	17
Mills v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970)	2, 3, 4
Oklahoma City v. *Tuttle*, 471 U.S. 808 (1985)	2
Piper v. *Chris-Craft Industries*, 430 U.S. 1 (1977)	18
Santa Fe Industries v. *Green*, 430 U.S. 462 (1977)	6, 9, 16, 18
Schlick v. *Penn-Dixie Cement Corp.*, 507 F.2d 374 (2d Cir. 1974), cert. denied, 421 U.S. 976 (1975)	2, 4
SEC v. *Sloan*, 436 U.S. 103 (1978)	18
St. Louis v. *Praprotnik*, 485 U.S. 112 (1988)	4
Teamsters v. *Daniel*, 439 U.S. 551 (1979)	18
United States v. *Generes*, 405 U.S. 93 (1972)	11
STATUTES & RULE:	
15 U.S.C. § 78bb(a)	10
Va. Code Ann. § 13.1-691	5
Va. Code Ann. § 13.1-691(A)(1)	7
Va. Code Ann. § 13.1-691(A)(3)	8
S. Ct. Rule 15	2
MISCELLANEOUS:	
A. Goolsby, *Virginia Corporation Law & Practice* (1990 Supp.)	8

REPLY BRIEF FOR THE PETITIONERS

Nothing in respondents' labored submission can obscure the fact that the court of appeals' judgment finds no support in federal proxy law and defies common sense. Petitioners, including the individual directors, have been ordered to pay damages of as much as $13,000,000 merely for stating that they recommended the merger because it afforded a "high price" to shareholders, even though the price unquestionably *was* high in the very sense used by the proxy statement—*i.e.*, "about 30% higher" than prior market price. Pet. App. 53a. They also have been subjected to damages for describing a prestigious investment banking firm, concededly unaffiliated with petitioners, as "independent." Worse yet, respondents have been allowed to recover millions of dollars in damages even though the jury did not find, and could not have found, that the proxy statement caused them any harm.

In our opening brief we demonstrated that the court of appeals was able to reach this startling result only by relying upon untenable theories of misrepresentation and causation. Not surprisingly, given these errors, *respondents do not defend the court of appeals' reasoning on either of the issues before the Court.* Instead, they have sought to reframe the case, grossly distorting the record in the process. For example, respondents have felt compelled to rewrite the proxy statement in order to make their misrepresentation claims seem plausible. And they have introduced a plethora of new factual contentions and theories of causation that never were presented to the jury. The problem with this strategy, of course, is that liability may be predicated only on the proxy statement that actually was issued—not the fictitious one that respondents have created—and only on causation allegations actually advanced at trial.

I. RESPONDENTS FAILED TO PROVE THAT THE PROXY STATEMENT CAUSED THEM ANY INJURY

The SEC is on common ground with us on one crucial point: the "judgment below was in error" (SEC Br. 29)

because the jury was allowed to award damages to respondents without finding that the proxy statement ever caused them any injury. Respondents attempt to avoid this fatal defect in two ways. First, they advance the spurious contention that the causation issue has been waived. Second, they fancifully assert that the votes of the minority shareholders were in fact critical to the transaction, either because a Virginia conflict-of-interest statute required minority shareholder approval or because FABI somehow conditioned the merger on their approval. Both of these contentions are untenable.

A. The Causation Issue Has Not Been Waived.

In a reprise of their brief in opposition to the petition, respondents contend (Br. 29-33) that the causation issue is not properly presented. By deciding to grant certiorari, however, this Court previously rejected that argument. See *Oklahoma City* v. *Tuttle*, 471 U.S. 808, 816 (1985); S. Ct. Rule 15. And it did so for good reason.

The causation argument was first raised at the summary judgment stage. The corporate defendants sought summary judgment on the ground that respondent Sandberg could not prove causation because FABI owned 85% of the voting shares.[1] Notwithstanding this argument, the district court declined to grant summary judgment and, in fact, effectively directed a verdict on causation by instructing the jury that it would be a "sufficient showing" of causation that the "proxy solicitation itself * * * was an essential link in the accomplishment of the transaction." J.A. 426. In the same vein, the court charged the

[1] The summary judgment brief demonstrated (J.A. 76) that "FABI and [VBI] owned more than sufficient shares to assure ratification of the merger, without putting the matter to the minority stockholders." The brief then noted (*ibid.*) that "*Mills* left open [the] issue presented in this case" and argued that the "rule [of *Schlick* v. *Penn-Dixie Cement Corp.*, 507 F.2d 374 (2d Cir. 1974)] makes no sense, and it particularly makes no sense in this case." J.A. 77. That submission was incorporated by reference once again when the corporate defendants sought a directed verdict. J.A. 326.

jury that, in such circumstances, it would be "no defense that the votes of the minority stockholders were not needed to approve the transaction." J.A. 427.

These portions of the charge were based directly on respondent Sandberg's proposed instructions 29 and 30. Contrary to respondents' demonstrably inaccurate representations to this Court (Br. 30-31 & 38 n.42), both sets of defendants did object to these instructions. The director-defendants contended, for example, that the instructions were "contrary to the law and common sense, because any of the alleged misstatements * * * cannot have caused any damage to Sandberg."[2] Petitioners again objected to the instructions in a bench conference, arguing that "the court has wrongly, we believe, decided the issue of law left open by footnote 7 of the *Mills* decision." J.A. 435.[3] Given the explicit objections to these critical instructions, it is hardly responsible advocacy for respondents to continue to assert that the causation issue was not properly raised in the district court.[4]

It is also astonishing to read respondents' assertion (Br. 31-32) that the court of appeals did not pass on the question left open in *Mills*. The Fourth Circuit's opinion speaks for itself. After acknowledging that "*Mills* left open the question of 'whether causation could be shown where management controls a sufficient number of shares

[2] Objections of Director Defendants to Plaintiff's Proposed Jury Instructions at 7. The corporate defendants' written objection appears in Objections of FABI and VBI to Plaintiff's Proposed Jury Charges at 6.

[3] Respondents' assertion (Br. 31 n.31) that the directors may not rely upon the objection voiced during the bench conference is mistaken. Although the objection was announced by counsel for the corporate defendants, it was made on behalf of both sets of defendants, pursuant to the district court's previous order that "I will assume that each joins in the others' objections unless you tell me otherwise." J.A. 132.

[4] All of the defendants again raised the causation issue in their post-trial motions. See Mem. of Director Defendants in Support of their Motion for JNOV at 22; Br. in Support of Defendants FABI and VBI's Motion for JNOV at 4 (J.A. 529-530).

to approve the transaction without any votes from the minority,'" the court below proceeded to adopt the holding of *Schlick* v. *Penn-Dixie Cement Corp.*, 507 F.2d 374 (2d Cir. 1974), that "if the proxy statement contained material misrepresentations and was an essential link in the merger, § 14(a) liability may be established" without regard to voting power. Pet. App. 13a-14a.[5] Thus, the issue left unresolved in *Mills* was squarely presented by both sets of petitioners and was "very clearly considered, and decided, by the Court of Appeals." *St. Louis* v. *Praprotnik*, 485 U.S. 112, 120 (1988). It has not been waived.

B. Respondents Never Alleged Or Proved Any Causal Connection Between The Purported Defects In The Proxy Statement And The Consummation Of The Merger.

In our opening brief, we made two general arguments about the causation-related flaws in this case. First, we argued that the Court should hold that causation cannot be shown in a Section 14(a) damages action where the minority shareholders could not have affected the outcome of the vote. We continue to urge the Court to adopt this view, which is the only approach that is faithful to Section 14(a)'s focus on the *voting* process. Although the SEC has persuasively demonstrated that *it* should be allowed to bring enforcement actions against those who make misrepresentations in a proxy statement, it has not begun to justify allowing recovery of damages by shareholders who have suffered *no* injury to their voting rights. Whatever the continuing validity of *J.I. Case Co.* v. *Borak*, 377 U.S. 426 (1964), it should not be extended far beyond its moorings.

---

[5] The court of appeals' detailed discussion of *Mills* and *Schlick* belies respondents' contention (Br. 31) that the court was merely referring to petitioners' concession that a proxy statement was "essential" to the consummation of the merger. In any event, petitioners conceded only that a proxy statement was required by law. The proper causation inquiry, however, looks not to whether the *proxy statement* was necessary but to whether the *approval of the minority shareholders* was an essential link in the merger.

We also argued that even if non-voting causation theories might be acceptable in some instances, causation surely was not found by the jury in this case. The SEC agrees with this contention, concluding that the court of appeals' "analysis was incorrect" (SEC Br. 27) and that its judgment "cannot stand." SEC Br. 28. For their part, respondents no longer deny that they were obliged to prove causation under Section 14(a), and they have not defended the rulings of the lower courts that causation may be satisfied simply by showing that it was necessary under state law to issue a proxy solicitation. Instead, respondents assert that they *did* prove causation at trial, based on two different theories. These arguments were never presented to the jury, however, and in any event they lack any legal or factual basis.

1. *The "Conflict-Of-Interest" Theory.* On at least a dozen separate occasions, respondents proclaim that the votes of the minority shareholders were critical to the merger because "Beddow's divided loyalties * * * made the merger voidable, or subject to suit for restitution * * * unless the actions of the Bank's board were approved by the minority stockholders." Resp. Br. 3; see also *id.* at 9, 10, 11, 29, 34, 35, 36, 40, 42, 43, 44. Respondents rely on a Virginia statute that allows a corporation (not an individual shareholder) to avoid a transaction involving a director with a conflict of interest unless *either* the board of directors ratifies the transaction, *or* the shareholders ratify it, *or* the transaction was fair to the corporation. Va. Code Ann. § 13.1-691. There are three insurmountable problems with respondents' reliance on this statute: (1) respondents have never before alleged that the statute is relevant to their showing of causation, and the jury was specifically instructed that minority shareholders' votes were of *no* significance in assessing causation; (2) the Virginia statute in fact did not make the votes of the minority shareholders necessary to the merger here; and (3) the argument relies on a "sue facts" theory of non-voting causation that is inconsistent with Section 14(a) and with this Court's deci-

sion in *Santa Fe Industries* v. *Green*, 430 U.S. 462 (1977).

The dispositive answer to respondents' belated attempt to show causation in this case is that they had a duty to prove causation to a properly instructed *jury*—not to concoct new theories in this Court that did not form the basis of the judgment under review. This is especially true where, as here, the issue of causation was effectively taken away from the jury by instructions such as the following:

> • "[A] shareholder such as Ms. Sandberg has made a sufficient showing of a causal relation between the violation and the injury for which she seeks redress if she proves that the proxy solicitation itself rather than the particular defect in the solicitation material was an essential link in the accomplishment of the transaction." J.A. 426.
>
> • "If you find that it was necessary for the bank to solicit proxies from minority shareholders in order to proceed with the merger, you may find that the proxy solicitation was an essential link in the accomplishment of the transaction." J.A. 426.
>
> • "If you find that * * * the proxy solicitation itself was an essential link in the accomplishment of the merger transaction, then you are instructed it is no defense that the votes of the minority stockholders were not needed to approve the transaction." J.A. 426-427.

As the SEC has explained (Br. 28), these instructions erroneously "permitted a finding of causation if the proxy solicitation was an 'essential link' in the accomplishment of the merger," without any showing that minority shareholders (by their votes or otherwise) were even a factor in the transaction.[6] It is clear, then, that

[6] Respondents are plainly wrong in suggesting (Br. 38-40) that the defects in the causation instructions could be cured by a boilerplate proximate cause instruction. It was respondents who asked for and received specific instructions that the jury need find only that the proxy solicitation was an essential link in order to find causation. Those instructions nullified any effect of the earlier general instruction regarding proximate cause. See *Francis* v. *Franklin*, 471 U.S. 307, 322 (1985).

respondents' new-found claim that the votes of minority shareholders were necessary to "eliminate[] the otherwise paralyzing effects of a director conflict of interest" (Resp. Br. 9) cannot rehabilitate the judgment below.

Beyond this, respondents' "conflict-of-interest" argument fails on its merits because the Virginia statute (which respondents selectively paraphrase but studiously avoid actually quoting) most assuredly did not make the minority shareholders' votes necessary for the effectuation of the merger. Rather, it was the approval of the transaction by the Bank's board of directors that immunized the merger from attack on any conflict-of-interest theory, under the first of the statute's three provisions. See Va. Code Ann. § 13.1-691(A)(1) (a corporate transaction is not voidable if "[t]he material facts of the transaction and the director's interest were disclosed or known to the board of directors or a committee of the board of directors and the board of directors or committee authorized, approved, or ratified the transaction").[7]

Respondents eventually acknowledge (Br. 43-44) that the Virginia conflict-of-interest statute does not generally require minority shareholder approval, but they claim (Br. 44 & n.50) that board approval was ineffective here because the board failed to exercise "independent judgment" with respect to the merger and "was falsely told that KBW had originated the $42 merger price when, in fact, it had not." These factual assertions are erroneous (see pages 18-19, *infra;* Pet. Br. 3-8), but

[7] Respondents have quoted materials relating to this point in a most deceptive fashion. Contrary to respondents' assertion (Br. 11, 44), the instruction that petitioners offered with respect to the state law fiduciary duty claim against defendant Beddow did not even remotely concede that minority shareholder approval was necessary to cure any conflict of interest. Rather, the proposed instruction did no more than paraphrase the statute's three alternatives for approval of a transaction. See J.A. 431. The Virginia statute is reproduced as an appendix to this brief.

they are, in any event, beside the point. The literal terms of the Virginia statute require only that the board be aware of the "material facts *of the transaction*" (emphasis added); it is apparent from the record (and respondents do not dispute) that the board knew the buy-out price and the other material terms of the merger agreement.[8] Not surprisingly, respondents fail to cite a single Virginia authority suggesting that the conflict-of-interest statute would void the merger in this situation.

Finally, it is important to recognize that respondents' "conflict-of-interest" argument is not really a theory of voting causation at all. Instead, it is a typical "sue facts" argument: respondents assert that the alleged misrepresentation in the proxy statement deprived them of an opportunity to bring a derivative action in order to rescind the merger transaction in state court. But this new allegation convincingly demonstrates why this Court should reject the "sue facts" theory of causation in Section 14(a) cases. For under this theory federal courts and juries applying federal proxy law not only would have to involve themselves in highly speculative applications of state corporations law (*e.g.*, would respondents have been able to satisfy the prerequisites for bringing a derivative action?), but would also have to determine whether a transaction was "fair to the corporation" within the meaning of state law. Va. Code Ann. § 13.1-691(A)(3). Surely, damages liability under Section 14(a) should not turn on guesses as to the nature of state law judicial remedies available to a shareholder. And involving the federal courts in the assessment of a transaction's "fairness" is flatly inconsistent with this Court's

[8] Ironically, the purpose of the Virginia statute is to *relax* the traditional common law rule and provide "a safe harbor for transactions between the corporation and one of its directors." The Virginia legislature fully recognized that "directors of majority-owned subsidiary corporations often find themselves faced with the necessity of considering transactions with the parent corporation." A. Goolsby, *Virginia Corporation Law & Practice* § 9.8 at 117. 119 (1990 Supp.).

admonition in *Santa Fe* that "the fairness of the terms of the transaction" is simply not a concern of federal securities law. 430 U.S. at 478.[9]

2. *The "Implied Condition" Theory.* Respondents' second theory of causation (Br. 45) is that FABI somehow conditioned its agreement to a merger on obtaining approval of the minority shareholders. This imaginative allegation suffers from the same flaws as respondents' "conflict-of-interest" theory: (1) it is a brand-new allegation that was never presented to the jury, which was instructed in a manner that dispensed with any need to find causation; (2) it has absolutely no foundation in the record or in fact; and (3) it relies on a "shame facts" theory of causation that has no basis in the language or purpose of Section 14(a).

Until the case reached this Court, respondents had never once suggested that FABI conditioned the transaction on the approval of minority shareholders. No such evidence was introduced at trial, nor, as we have explained (see page 6, *supra*), was the jury ever asked to find that causal link. Accordingly, even if the allegation had some factual basis, it could not cure respondents' failure to advance it at trial or the defect in the instructions that took the causation issue away from the jury.

In any event, respondents' new allegation is baseless. The evidence cited by respondents (Br. 45-46) shows only that FABI was interested in offering a price that was so high that "any reasonable shareholder will accept it." J.A. 99. There was *no* evidence, however, that once

[9] Respondents, of course, *did* sue in state court to upset the merger or obtain an appraisal, alleging—without success—numerous theories of fraud and breach of fiduciary duty. It is telling that they never asserted (either in state or federal court) the unsupported theory of statutory "voidability" now presented for the first time in this Court.

FABI decided on its price it would refuse to proceed with the merger if the minority shareholders chose not to accept it (*i.e.*, if they acted in a way that FABI considered unreasonable). The evidence showed that FABI planned to go forward with the merger regardless of minority shareholder dissatisfaction, as it had every right to do under state law. Pet. App. 37a. Why would FABI have defended against respondents' state court action unless it was prepared to go forward despite opposition by minority shareholders? Respondents' argument intentionally blurs the fundamental distinction between an understandable desire to please minority shareholders, if reasonably possible, and a commitment to condition a merger on the blessing of minority shareholders.

Moreover, here again the nature of respondents' argument reveals the deep flaws in any theory of non-voting causation under Section 14(a)—in this instance, "shame facts." Respondents would allow a jury to impose damages liability based on sheer speculation about whether a proxy issuer would have gone forward with an economically beneficial transaction in the face of some (how much?) negative reaction from minority shareholders. As we argued in our opening brief (at 44), this Court should not allow respondents to satisfy their burden of proving causation in this judge-made cause of action by relying upon such inherently speculative and conjectural assertions. Acceptance of respondents' arguments would violate Congress's express admonition that damages under the federal securities laws be limited to "actual damages on account of the act complained of." 15 U.S.C. § 78bb(a). Because respondents did not and could not prove that any defects in the proxy statement caused them harm, the judgment below "cannot stand." SEC Br. 28.[10]

---

[10] Entry of judgment for petitioners, rather than a remand for a new trial, is the correct disposition here for a number of reasons. First, respondents utterly failed to meet their burden of proof on one of the critical elements of their case, having "[t]hroughout the lengthy history of this case" failed to produce any evidence of causation. *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 215 (1976). "In these circumstances" it would be "inappropriate to remand the action for further proceedings," *ibid.*, since petitioners were entitled to a directed verdict or judgment notwithstanding the verdict. See also *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 490 (1977) (plaintiffs "did not prove any cognizable damages and have not offered any justification" for putting defendants through a new trial); *United States* v. *Generes*, 405 U.S. 93, 106 (1972) (refusing to remand for a new trial where the Court examined the record and found "nothing that would support a jury verdict * * * had the [correct] standard been embodied in the instructions"). Moreover, quite aside from the unfairness of putting petitioners through a second trial, it is obvious that a remand on the issue of causation would be futile. Even today, the theories that respondents advance are incurably deficient, whether or not the Court absolutely rejects the possibility of predicating causation on "sue facts" and "shame facts." See *Bigelow* v. *Virginia*, 421 U.S. 809, 827 (1975); *Haynes* v. *United States*, 390 U.S. 85, 101 (1968).

II. THE PROXY STATEMENT DID NOT CONTAIN ANY MATERIAL MISREPRESENTATIONS OF FACT

Four words suffice to answer virtually all of the arguments that respondents and the SEC have put forward in support of the allegations that the proxy statement contained material misrepresentations: *read the proxy statement.* For the most remarkable aspect of these arguments is their complete infidelity to what the proxy statement actually says. Once the proxy statement itself is considered, it becomes apparent that respondents' proxy fraud allegations are the product of a strained misconstruction of obviously truthful terminology.

A. The Directors' Reasons For Recommending The Transaction.

It is useful to begin by reminding this Court of what the jury was instructed and what the court of appeals held. The first statement at issue was that the board approved the merger because it was "fair" and "provides an opportunity for the Bank's public shareholders to

achieve a high value for their shares." Pet. App. 37a, 53a. The Fourth Circuit declared that this statement was materially misleading because "the jury was certainly justified in believing that the directors did not believe a merger at $42 per share was in the minority stockholders' interest but, rather, that they voted as they did for other reasons, *e.g.*, retaining their seats on the board." *Id.* at 15a. In so holding, the court of appeals rejected the prevailing view that a claim addressed to "the 'true' motivations of the directors * * * states no cause of action under the 1934 Act" (*Kas v. Financial General Bankshares, Inc.*, 796 F.2d 508, 513 (D.C. Cir. 1986)), particularly where, as here, the shareholders received detailed information enabling them to draw their own conclusions about the directors' motivations.

Significantly, respondents make no serious effort to defend the court of appeals' reasoning that federal proxy law allows a jury to inquire into directors' subjective motivations. Instead, they have devised a new "objective" theory of misrepresentation, contending (Br. 13-14; emphasis added) that the proxy statement misrepresented "an objective event—*formal* action by the board to approve the merger because it offered minority stockholders a high value." There are two glaring defects in this argument. First, this new "objective" theory bears no resemblance to the allegation that actually was presented to the jury. Second, the proxy statement cannot possibly be read to represent that the board "formally" adopted a list of reasons for the merger.

Respondents' revisionist view is that subjective motivation had nothing to do with the imposition of liability in this case. See Resp. Br. 8. But respondents told the jury that the proxy statement was false precisely because some of the directors "didn't think [the offer price] was a high value" (J.A. 406), and the jury was specifically instructed that respondents alleged that "high value * * * was not the reason for [the directors'] approval." J.A. 421. Most telling, the court of appeals understood respondents' claim to involve an attack on the directors'

subjective motivations. See Pet. App. 15a. Although respondents may now regret their litigation strategy, a brief in the Supreme Court is not the place to introduce new theories of liability.

It is easy to understand why respondents' "formal board resolution" theory was not advanced at trial: it lacks any connection to what the proxy statement actually said. The only formal resolution described in the proxy statement is as follows: "[a]t the February 12, 1987 [board] meeting * * *, all directors present unanimously recommended that shareholders vote in favor of approval of the Plan of Merger." Pet. App. 53a. There is no dispute that such a resolution was unanimously adopted by the board. J.A. 458-460, 466. The proxy statement does not even remotely suggest that the board voted to issue a formal proclamation that the price was "high."

The proxy statement instead speaks of what the board "believes," "considered," "evaluated," and was "aware of." Pet. App. 37a-38a, 53a-54a. None of these terms implies a formal vote on each factor that was deemed relevant to the merger. Moreover, uncontroverted record evidence supported the representation in the proxy statement that the directors considered the fairness of the $42 offer and the $10 premium over market price. J.A. 234, 239, 257, 273, 279, 283; Pet. Br. 5-8 (citing record evidence). A board certainly can consider and evaluate such factors without taking what respondents characterize as "formal action" (Resp. Br. 14) evidencing that consideration. All of this is ultimately quite academic, of course, because respondents' "objective" theory of misrepresentation was *never presented to the jury.*

The SEC, by contrast, continues to focus on the allegation that the proxy statement misrepresented the true subjective motivations of the directors, arguing (Br. 17) that the jury could have found that the proxy statement was false "because the board approved the merger for other than *its stated reason*" (emphasis added). The problem with this argument is that it misreads the plain

language of the proxy statement to say that the *sole* reason for the directors' recommendation was their belief that a high price was being offered for minority shares.

The proxy statement unambiguously declared that the board's recommendation of the merger was "based upon its evaluation of a *number of factors*, including those set forth below." Pet. App. 53a (emphasis added). As for the factors that were considered, the proxy statement explained that "[t]*he principal purpose of the Merger is to achieve organizational efficiencies* resulting from the Bank's becoming a wholly-owned subsidiary of Virginia Bankshares." *Ibid.*; see also Pet. App. 38a. The proxy statement then described the premium for shareholders, which was an additional factor supporting the merger (*id.* at 53a-54a):

> The Plan of Merger has been approved by the Board of Directors because it provides an opportunity for the Bank's public shareholders to achieve a high value for their shares. The price to be paid is about 30% higher than the $32.50 per share at which the Bank's common stock traded on February 8, 1987, the last trading day prior to announcement of the proposal.

Nothing in this passage even remotely suggests that the *sole* reason for the board's recommendation was its assessment that a high value was being offered for the shares. To the contrary, the proxy statement explicitly referred to "a number of factors" and stated that the "principal purpose" of the merger was to improve the bank's efficiencies. Pet. App. 53a. Only by rewriting the proxy statement can the SEC attack it as false.

This same refusal to look at the words actually used in the proxy statement pervades the Fourth Circuit's discussion of this purported misrepresentation. The court of appeals ruled that the jury could have found that the directors were "considerably less concerned with the stockholders' interests than with their own." Pet. App. 15a. But this speculation does nothing to call into question the accuracy of the representation in the proxy statement that a payment of $10 above market price was "high" (*i.e.* "about 30% higher" than prior market price) and that this premium for the minority shareholders was *one* of the factors that persuaded the board to recommend the merger. No matter what *else* may have influenced their decision, it is absurd to suppose that the directors failed to recognize and give weight to the fact that the buy-out price was 30% higher than prior market price—a premium that was all the more striking because the acquiring party already owned a controlling interest. J.A. 342-344. Who could have failed to consider and attach significance to that unmistakable premium over market value? Certainly not directors who themselves held substantial amounts of minority stock.

It is apparent, then, that the "high value" passage of the proxy statement can be deemed false only if one is willing to indulge in the ludicrous assumption that the directors never even considered the premium being offered for the shares as *one* of "a number of factors" (Pet. App. 53a) supporting the merger. According to the SEC, however, the federal securities laws invite just such an inquiry into the directors' minds and allow juries to psychoanalyze the directors to determine their true mix of motivations.[11] That position is directly contrary to a long line of appellate decisions that have limited proxy fraud liability to misstatements of verifiable, objective facts—facts that the issuer of a proxy statement can readily ascertain and that a jury can fairly judge. See Pet. Br. 31-33.[12]

---

[11] The SEC never explains how an inquiry into motivation would proceed in the case of a 22-member board of directors. Must the plaintiff prove that all of the directors—or just a majority, or just one—harbored some unspoken motivation? In this case, for example, the record contains no evidence at all concerning the motivations of seven of the directors who were held liable for millions of dollars in damages.

[12] The SEC suggests (Br. 10-11) that statements of reasons, or statements that a transaction is fair, are required in a variety of proxy statements. To the extent this is true, it highlights the need

Even if there were situations in which it might be appropriate to allow a jury to probe into the sincerity of directors, this is not such a case. The SEC purports to recognize the dangers of unwarranted speculation (Br. 12), but it never applies that policy to this record. Instead, the SEC urges the Court to find a proxy misrepresentation here even though there was *no* evidence suggesting that the directors failed to recognize that the merger "offered the minority stockholders an opportunity to receive a high value for their shares" (Pet. App. 15a) and even though a finding of misrepresentation is inherently implausible and is inconsistent with the following objective—and uncontested—facts:

- The reason given by the proxy statement comported with economic reality. The merger price *was* high in the very sense used in the proxy statement—*i.e.*, it reflected a 30% premium over market price. See Pet. App. 60a-66a.

- The reason given by the proxy statement comported with the contemporaneous discussions of the directors. See Pet. Br. 5-8.[13]

---

for this Court to set limits on directors' vulnerability to attack. For under the SEC's theory, an action under Section 14(a) may be commenced by any shareholder who alleges that the directors really harbored some ulterior motive or who disagrees with the directors' assessment of fairness. That is precisely the kind of vexatious securities litigation that the Court has sought to avoid. What is more, if the SEC is allowed to (a) require statements of fairness and then (b) subject those statements to scrutiny under federal law based on a "misrepresentation" theory, it will have been allowed to evade this Court's clear holding in *Santa Fe* that the "fairness" of corporate transactions is a concern of state—not federal—law.

[13] Two of the directors acknowledged the obvious—that FABI, in its capacity as holder of 85% of the shares, had power under state law to replace them. But these directors also testified that they would not have recommended the merger had they not considered it fair to the minority shareholders. Sidney Dewberry, for example, who recognized that FABI "had the votes," also testified that "I clearly understood my obligations * * * [t]o see that the stockholder[s] got a fair price for their stock." J.A. 274-275. Similarly, Linda Michael recognized that FABI had the power to "get a board that would approve it," J.A. 282, but also testified that she understood that her duty was to see that the minority shareholders' "rights were respected in the price they were paid for their stock." J.A. 283-284.

- The directors had a strong incentive to consider the premium over market price, because *all* of them were minority shareholders. Indeed, one of the directors, who held more than $1.3 million of bank stock, testified that the price was "far more than generous." See J.A. 273.

Subjective motivations of directors should not be subjected to "judicial psychoanalysis" (SEC Br. 12) on a record such as this one. As this Court recently remarked in a related context, "implausible" factual allegations that make "no economic sense" should not be submitted to the jury, particularly where they rest on "ambiguous evidence." *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 587, 593, 596 (1986).

B. The Evaluation By The Independent Investment Banking Firm.

Respondents and the SEC have an equally difficult time justifying the imposition of liability based upon the proxy statement's description of KBW, the independent investment banking firm hired by FABI. Again, it is critical to consider the actual words of the proxy statement in evaluating this claim. The alleged misrepresentation consisted entirely of the following: "FABI's Board of Directors commissioned Keefe, Bruyette & Woods, Inc., an independent investment banking firm, to pass on the fairness of the Merger from a financial point of view." Pet. App. 38a. This unremarkable statement was entirely true and accurate. Respondents and the SEC do not dispute that FABI hired KBW, that KBW *was* an independent investment banking firm, and that it *did* pass on the financial fairness of the merger—whatever state-law grievances respondents might have about the adequacy of its performance. See Pet. App. 74a-76a; J.A. 261, 339-363.

Because nothing in the literal language of the proxy statement falsely described the nature of KBW or its involvement in this transaction, respondents and the SEC have conjured up a fictional account of what the proxy statement says. For example, the SEC, after conceding (Br. 20) that the word "independent" accurately described KBW and that the judgment cannot stand if it was based on a challenge to that description, nonetheless argues that a reasonable reader of the proxy statement "could have formed the impression from the proxy statement that KBW had *originated* the $42 price per share." Br. 21 (emphasis in original). But the SEC never explains how it is possible to read the words "pass on the fairness of the Merger" to imply the notion of "originating" a price. Indeed, if anything, the words "pass on the fairness" suggest that KBW reviewed a price proposed by others. Certainly, they imply nothing about who originated the price. Like Humpty Dumpty, the SEC simply insists that language "means just what I choose it to mean—neither more nor less." [14]

Respondents offer yet another version of what the proxy statement might have been understood to say, but it is no more plausible. Based on testimony that Michael Connor of KBW was aware that Jack Beddow (who had no decision-making authority at FABI) was thinking about an offer in the $40 range, respondents assert (Br. 23-24) that KBW's evaluation of the price was not "independent" and was not carried out to "pass on the fairness" of the transaction.[15] Unfortunately for respondents,

[14] This Court has viewed similar submissions from the SEC with a healthy dose of skepticism. See, *e.g.*, *Dirks* v. *SEC*, 463 U.S. 646, 658 n.17 (1983); *Teamsters* v. *Daniel*, 439 U.S. 551, 567 & n.21 (1979); *SEC* v. *Sloan*, 436 U.S. 103, 116, 122-123 (1978); *Santa Fe Industries* v. *Green*, 430 U.S. at 473 n.12; *Piper* v. *Chris-Craft Industries*, 430 U.S. 1, 33, 39-42 (1977); *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 214-216 n.33 (1976); *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 746-747 n.10 (1975).

[15] Respondents blatantly distort Connor's testimony when they represent (Br. 24) that he disclaimed rendering an opinion that "pass[ed] on the fairness of" the $42 price to the minority shareholders. Connor in fact repeatedly testified that "even though we were working for the holding company, our charge was to come up with a price that the board of directors could reasonably view as fair, and at the $42 level, we were above the level that we would consider fair." J.A. 356; see also J.A. 341, 346, 347, 359 (FABI told Connor that "we want a transaction that is fair to the minority").

this misrepresentation theory confronts two impediments. First, it cannot be reconciled with the plain words of the proxy statement. The proxy statement described KBW as "independent"; it did not say, as respondents falsely paraphrase it (Resp. Br. 4, 25), that KBW conducted an "independent valuation" or an "independent analysis" of the stock. In fact, the proxy statement clearly and repeatedly disclosed that KBW obtained information relating to the issue of financial fairness directly from FABI and that it "did not attempt to verify independently any such information." Pet. App. 54a, 75a.

Second, respondents neglect to mention that Connor also testified, without contradiction, that it is entirely normal for KBW to be aware of the price range that a company is considering and that such knowledge has absolutely no effect on the integrity of its analysis or its fairness opinion. J.A. 261. Apparently, in respondents' view, no investment banking firm could ever be "independent," because due diligence (including discussions with the party that retained it) would be evidence of a lack of independence.

When all is said,[16] the misrepresentation claims advanced in this case, and adopted by the court of appeals, are profoundly disturbing. This case does not involve quibbles over debatable constructions of ambiguous language in a proxy statement. Rather, the representations made in the proxy statement were literally truthful in every respect; there were no "buried facts" (SEC Br. 11), and there is no suggestion that the language was

[16] It does respondents no good to list in their brief (at 26-29) various other claims of misrepresentation, none of which was sustained by the court of appeals and none of which pertains to the alleged misrepresentations that are before this Court.

used in the proxy statement in an unnatural manner. See *Backman* v. *Polaroid Corp.*, No. 89-1171 (1st Cir. Aug. 2, 1990) (en banc), slip. op. 22 (overturning a jury verdict where a "simple statement" challenged by plaintiffs under the securities laws "was precisely correct"). The question thus becomes whether it was "within the province of the jury," as respondents submit (Br. 25), to take that straightforward language and read into it unexpressed meanings and implications, and to indulge in far-fetched speculations about the subjective beliefs of 22 corporate directors, in order to convert it from a literally true statement into a fraudulent misrepresentation. No issuer of a proxy statement could comply with such an erratic and unprincipled regime. Congress, in enacting Section 14(a), did not create that system of proxy regulation, and the federal courts should not do so by judicial implication.[17]

CONCLUSION

The decision of the court of appeals should be reversed, with directions to enter judgment in petitioners' favor on the federal securities law claims.

[17] Respondents suggest (Br. 48 n.54) that if the Court reverses the judgment below on the misrepresentation issue it should remand the case to allow the court of appeals to consider other claims of misrepresentation in the proxy statement. If the Court does remand for that purpose, it should also make clear that the court of appeals is free to reconsider the judgment sustained against the directors on the state-law count, given the substantial interrelation of the federal and state charges in this case. See J.A. 45-52, 430-431, 405-409 (respondent Sandberg's closing argument); see also Pet. 27-30.

Respectfully submitted.

JOHN S. STUMP
McGuire, Woods, Battle & Boothe
8280 Greensboro Drive
Post Office Box 9346
McLean, VA 22102

LEWIS T. BOOKER
Hunton & Williams
707 East Main Street
Post Office Box 1535
Richmond, VA 23212

STEPHEN M. SHAPIRO
Counsel of Record
ANDREW L. FREY
KENNETH S. GELLER
LAWRENCE C. MARSHALL
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 463-2000

Counsel for Petitioners

AUGUST 1990

APPENDIX

Virginia Code Ann. § 13.1-691 provides in pertinent part as follows:

> *Director conflict of interests.*—A. A conflict of interests transaction is a transaction with the corporation in which a director of the corporation has a direct or indirect personal interest. A conflict of interests transaction is not voidable by the corporation solely because of the director's interest in the transaction if any one of the following is true:
>
> 1. The material facts of the transaction and the director's interest were disclosed or known to the board of directors or a committee of the board of directors and the board of directors or committee authorized, approved, or ratified the transaction;
>
> 2. The material facts of the transaction and the director's interest were disclosed to the shareholders entitled to vote and they authorized, approved, or ratified the transaction; or
>
> 3. The transaction was fair to the corporation.

(7)

No. 89-1448

Supreme Court, U.S.
FILED
JUN 25 1990
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1989

VIRGINIA BANKSHARES, INC., ET AL., PETITIONERS

v.

DORIS I. SANDBERG, ET AL.

FIRST AMERICAN BANKSHARES, INC., ET AL., PETITIONERS

v.

PAUL H. WEINSTEIN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION AND THE FEDERAL DEPOSIT INSURANCE CORPORATION AS AMICI CURIAE

WILLIAM C. BRYSON
Acting Solicitor General

DAVID L. SHAPIRO
Deputy Solicitor General

MICHAEL R. DREEBEN
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

JAMES R. DOTY
General Counsel

PAUL GONSON
Solicitor

JACOB H. STILLMAN
Associate General Counsel

ERIC SUMMERGRAD
LUCINDA O. MCCONATHY
Assistant General Counsels

JOSEPH A. FRANCO
Special Counsel

ANDREW S. BENNETT
Attorney
Securities and Exchange Commission
Washington, D.C. 20549

ALFRED J. T. BYRNE
General Counsel
Federal Deposit Insurance Corporation
Washington, D.C. 20429

BEST AVAILABLE COPY

DOUGLAS H. JONES
Senior Deputy General Counsel
DOROTHY L. NICHOLS
Associate General Counsel
COLLEEN B. BOMBARDIER
Senior Counsel
Federal Deposit Insurance Corporation
Washington, D.C. 20429

QUESTIONS PRESENTED

1. Whether representations in a proxy statement about the reasons or purposes for corporate transactions, and characterizations of matters disclosed in the statement, can be materially false or misleading, and therefore actionable, under the proxy provisions of Section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78n(a).

2. Whether, in a private action alleging the use of a false or misleading proxy statement in violation of Section 14(a) of the Securities Exchange Act of 1934, the allegedly misled shareholders can establish the causation necessary for recovery when they did not have sufficient votes to block approval of the transaction that was the subject of the solicitation.

TABLE OF CONTENTS

	Page
Interest of the Securities and Exchange Commission and the Federal Deposit Insurance Corporation	1
Statement	2
Summary of argument	6
Argument:	
I. Representations respecting reasons or purposes, and adjectives or characterizations, can be materially false or misleading	8
A. A statement of reasons can be material	8
B. Characterizations and adjectives can be material	18
II. To recover for a violation of Section 14(a), minority shareholders must show that the violation caused them injury, but they may make such a showing even when they lack sufficient voting strength to block the transaction to which a proxy statement related	21
A. Nonvoting causation theories are consistent with the purposes of the Exchange Act	23
B. The court of appeals applied an incorrect causation theory	27
Conclusion	29

TABLE OF AUTHORITIES

Cases:

Adams Fruit Co. v. *Barrett*, 110 S. Ct. 1384 (1990)	16
Alabama Farm Bureau Mutual Cas. Co. v. *American Fidelity Life Ins. Co.*, 606 F.2d 602 (5th Cir. 1979), cert. denied, 449 U.S. 820 (1980)	17, 25
Atlantic Richfield Co. v. *USA Petroleum Co.*, 110 S. Ct. 1884 (1990)	23

Cases – Continued: Page

Basic Inc. v. *Levinson*, 485 U.S. 224 (1988) 8, 9, 17, 19, 27, 28
Berg v. *First American Bankshares, Inc.*, 796 F.2d 489 (D.C. Cir. 1986) 9, 13, 15
Biesenbach v. *Guenther*, 588 F.2d 400 (3d Cir. 1978) 15
Brunswick Corp. v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) 23
Cole v. *Schenley Industries, Inc.*, 563 F.2d 35 (2d Cir. 1977) 25, 26
Cowin v. *Bresler*, 741 F.2d 410 (D.C. Cir. 1984) ... 27
Craftmatic Securities Litigation v. *Kraftsow*, 890 F.2d 628 (3d Cir. 1989) 14
Data Probe Acquisition Corp. v. *Datatab, Inc.*, 722 F.2d 1 (2d Cir. 1983), cert. denied, 465 U.S. 1052 (1984) 17
Field v. *Trump*, 850 F.2d 938 (2d Cir. 1988), cert. denied, 109 S. Ct. 1122 (1989) 15
Galfand v. *Chestnutt Corp.*, 545 F.2d 807 (2d Cir. 1976) 12
Gerstle v. *Gamble-Skogmo, Inc.*, 478 F.2d 1281 (2d Cir. 1973) 20
Gillette Co. v. *RB Partners*, 693 F. Supp. 1266 (D. Mass. 1988) 20
Goldberg v. *Meridor*, 567 F.2d 209 (2d Cir. 1977), cert. denied, 434 U.S. 1069 (1978) 25
Golub v. *PPD Corp.*, 576 F.2d 759 (8th Cir. 1978) 17
Gorris v. *Scott*, 9 L.R.-Ex. 125 (1874) 23
Healey v. *Catalyst Recovery of Pennsylvania, Inc.*, 616 F.2d 641 (3d Cir. 1980) 25
Isquith v. *Middle South Utilities, Inc.*, 847 F.2d 186 (5th Cir.), cert. denied, 488 U.S. 926 (1988) 20

Cases – Continued: Page

J.I. Case Co. v. *Borak*, 377 U.S. 426 (1964) 22, 23, 27, 28
Kademian v. *Ladish Co.*, 792 F.2d 614 (7th Cir. 1986) 14
Kamerman v. *Steinberg*, 891 F.2d 424 (2d Cir. 1989) 15
Kas v. *Financial General Bankshares, Inc.*, 796 F.2d 508 (D.C. Cir. 1986) 12, 14, 15, 17
Kennedy v. *Tallant*, 710 F.2d 711 (11th Cir. 1983).. 11
Kidwell ex rel. Penfold v. *Meikle*, 597 F.2d 1273 (9th Cir. 1979) 25
Lessler v. *Little*, 857 F.2d 866 (1st Cir. 1988), cert. denied, 109 S. Ct. 1130 (1989) 20
Madison Consultants v. *FDIC*, 710 F.2d 57 (2d Cir. 1983) 25
McMahan & Co. v. *Wherehouse Entertainment, Inc.*, 900 F.2d 576 (2d Cir. 1990) 19
Milkovich v. *Lorain Journal Co.*, No. 89-645 (June 21, 1990) 11
Mills v. *Electric Auto Lite Co.*, 396 U.S. 375 (1970) 6, 21, 22, 23, 28
Mills v. *Electric Auto Lite Co.*, 403 F.2d 429 (7th Cir. 1968), vacated, 396 U.S. 375 (1970) 11
Panter v. *Marshall Field & Co.*, 646 F.2d 271 (7th Cir.), cert. denied, 454 U.S. 1092 (1981) 14
Piper v. *Chris-Craft Industries, Inc.*, 430 U.S. 1 (1977) 26
Rubenstein v. *IU Int'l Corp.*, 506 F. Supp. 311 (E.D. Pa. 1980) 12
Santa Fe Industries, Inc. v. *Green*, 430 U.S. 462 (1977) 7, 13, 15, 16, 17, 25
Schlick v. *Penn-Dixie Cement Corp.*, 507 F.2d 374 (2d Cir. 1974), cert. denied, 421 U.S. 976 (1975) 6, 22, 26
SEC v. *Parklane Hosiery Co.*, 558 F.2d 1083 (2d Cir. 1977) 12
Superintendent of Insurance v. *Bankers Life & Cas. Co.*, 404 U.S. 6 (1971) 17

Cases—Continued: Page

Swanson v. *American Consumers Industries, Inc.*, 475 F.2d 516 (7th Cir. 1973) 25
TSC Industries, Inc. v. *Northway, Inc.*, 426 U.S. 438 (1976) 7, 8. 10, 12, 18, 19, 23, 27
United States v. *Margala*, 662 F.2d 622 (9th Cir. 1981) 26
Wright v. *Heizer Corp.*, 560 F.2d 236 (7th Cir. 1977), cert. denied, 434 U.S. 1066 (1978) 25

Statutes and regulations:

Clayton Act, 15 U.S.C. 4 23
Securities Acts Amendments of 1964, Pub. L. No. 88-467, § 5(c), 78 Stat. 570 24
Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq.*:
§ 10(b), 15 U.S.C. 78j(b) 7, 8, 13, 15, 25, 27
§ 12(i), 15 U.S.C. 78*l*(i) 4
§ 14(a), 15 U.S.C. 78n(a) ..... *passim*
§ 14(c), 15 U.S.C. 78n(c) 3, 24
§ 14(e), 15 U.S.C. 78n(e) 27
§ 28, 15 U.S.C. 78bb(a) 16
Va. Code Ann. (1989):
§ 13.1-718(A) 3
§ 13.1-718(D) 3
§ 13.1-718(E) 3
2 Model Business Corp. Act Ann. § 13.21 (1985) .. 24
12 C.F.R.:
Section 335.206 ..... 4, 16
Section 335.212, Item 14(a) 10
Section 335.409 11
17 C.F.R.:
Section 210.2-01(b) 19
Section 240.10b-5 ..... 8, 13
Section 240.13d-1(a) 10

Regulations—Continued: Page

Section 240.13e-3 10
Section 240.13d-101, Item 4 10
Section 240.13e-100 11
Item 7(a) 11
Item 7(b) 11
Item 7(c) 11
Item 8(a) 11
Item 8(b) 11
Section 240.14a-1 *et seq.* 10
Section 240.14a-9 4
Section 240.14a-9(a) 16
Section 240.14a-101 10
Item 11 10
Item 12 10
Item 14 10
Item 14(a)(3)(ii) 10
Item 16 10
Item 19 10
Section 240.14c-6 24

Miscellaneous:

American Institute of Certified Public Accountants, *Codification of Statements on Auditing Standards* (1987) 19
American Stock Exchange Constitution and Rules (CCH) (1989) 24
L. Brandeis, *Other People's Money and How the Bankers Use It* (10th printing 1934) 27
Douglas, *Directors Who Do Not Direct*, 47 Harv. L. Rev. 1305 (1934) 26
Frankfurter, *The Federal Securities Act: II*, 8 Fortune 53 (1933) 26
Gelb, *Rule 10b-5 and* Sante Fe—*Herein of Sue Facts, Shame Facts, and Other Matters*, 87 W. Va. L. Rev. 189 (1985) 25

Miscellaneous – Continued: Page

Loss, *The SEC Proxy Rules and State Law*, 73 Harv. L. Rev. 1249 (1960) 23

New York Stock Exchange Constitution and Rules (CCH) (1990) 24

Note, *Causation and Liability in Private Actions for Proxy Violations*, 80 Yale L.J. 107 (1970) ... 25

Note, *Suits for Breach of Fiduciary Duty under Rule 10b-5 After* Santa Fe Industries, Inc. *v.* Green, 91 Harv. L. Rev. 1874 (1978) 25

S. Rep. No. 1455, 73d Cong., 2d Sess. (1934) 24

SAS 1, AU § 220.03 19

Securities and Exchange Commission, *Disclosure to Investors: A Reappraisal of Administrative Policies under the '33 and '34 Acts* (1969) 26-27

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1448

VIRGINIA BANKSHARES, INC., ET AL., PETITIONERS

v.

DORIS I. SANDBERG, ET AL.

FIRST AMERICAN BANKSHARES, INC., ET AL., PETITIONERS

v.

PAUL H. WEINSTEIN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION AND THE FEDERAL DEPOSIT INSURANCE CORPORATION AS AMICI CURIAE

INTEREST OF THE SECURITIES AND EXCHANGE COMMISSION AND THE FEDERAL DEPOSIT INSURANCE CORPORATION

The Securities and Exchange Commission is the agency principally responsible for the administration and enforcement of the federal securities laws. The Federal Deposit Insurance Corporation (FDIC) is the agency principally responsible for the administration and enforcement of those laws as they relate to the bank at issue here. The first issue in this case is whether representations in a proxy statement concerning directors' reasons and purposes for recommending approval of a particular transaction, and their characterizations or descriptions of matters discussed in the statement, can be materially false or misleading under federal proxy antifraud provisions. Although the issue arises in the context of a private damages action, the same principles of materiality apply in government enforcement

actions. The second issue is whether minority shareholders can establish that their injuries were caused by a false or misleading proxy statement used in violation of Section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78n(a), when they lacked sufficient votes to block the transaction on which the vote was taken. That issue does not arise in government actions, in which causation is not an element, but is important in private actions to enforce the securities laws, and such actions serve to complement federal enforcement programs.

STATEMENT

These cases arise from a May 1987 "freeze-out" merger in which the First American Bank of Virginia (Bank) was merged into Virginia Bankshares, Inc. (VBI), a wholly-owned subsidiary of First American Bankshares, Inc. (FABI). Before the merger, VBI owned 85% of the Bank's shares; the effect of the merger was to convert the 15% minority-held Bank shares (owned by about 2,000 shareholders) into a right to receive $42 per share.

1. a. In December 1986, FABI, desiring to bring about the merger, engaged the investment banking firm of Keefe, Bruyette & Woods, Inc. (KBW), to provide an opinion regarding a fair price for the minority shares. J.A. 158-159. Jack Beddow, an officer of both FABI and the Bank, told KBW that FABI was considering a range around $40 per share for the minority shareholders.[1] Subsequently, KBW rendered an opinion that $42 represented a fair price, and it made a presentation to the executive committee of the Bank's Board of Directors. The committee recommended to the full board that FABI's proposal be accepted, and thereafter the directors voted to do so. Although VBI's 85% interest in the Bank was sufficient to approve the merger without the support of minority shareholders, the board authorized the solicitation of the minority

[1] The KBW official who signed that firm's opinion letter testified that FABI's "Jack [Beddow] had an idea around the $40 range at some point very early in the discussions." J.A. 260. See also J.A. 188-189, 191, 383-386 (although FABI's chairman had not reached a decision, FABI internally discussed $40-$42 per-share price before KBW expressed its opinion)

shareholders' proxies to vote for the proposed merger.[2] Pet. App. 5a-6a.

b. The proxy statement contained 35 pages of information about the merger and the Bank's activities. Of particular relevance here, the statement informed shareholders that the Board of Directors had approved the plan of merger as being in the "best interest of the Bank's shareholders" and set forth its recommendation that shareholders vote to approve the merger. In explanation, the proxy statement said: "The Plan of Merger has been approved by the Board of Directors because it provides an opportunity for the Bank's public shareholders to achieve a high value for their shares." The statement noted that the $42 per-share price to be paid to the shareholders was approximately 30% higher than the market price prior to the merger's announcement, and that the price represented approximately a 26% premium over book value. Pet. App. 53a-54a.

Immediately following was a section captioned "Opinion of Financial Advisor." That section stated that the Board's Executive Committee had "considered a presentation by [KBW], an investment banking firm retained by FABI to deliver its written opinion as to the value to be ascribed to the estimated 15% of the shares of the Bank not owned by [VBI]." Pet. App. 54a. Earlier in the statement, KBW was described as "an independent investment banking firm," commissioned by FABI "to pass on the fairness of the Merger from a financial point of view." *Id.* at 38a. The statement referred shareholders to KBW's opinion, which was reproduced in an appendix to the proxy statement. *Id.* at 38a, 54a.[3] It added that KBW's opinion relied upon and

[2] Virginia law provides that a plan of merger must be submitted for approval by shareholders, but does not require a proxy solicitation. A corporation is simply required to notify shareholders of the shareholders' meeting at which the plan of merger will be considered. The merger must then be approved by more than two-thirds of the votes entitled to be cast. Va. Code Ann. § 13.1-718(A), (D) and (E) (1989). When proxies are not solicited on behalf of management, the issuer must send an information statement to shareholders as required by 15 U.S.C. 78n(c). See note 40, *infra*.

[3] That opinion, addressed to FABI, stated that "[y]ou have requested our opinion as to the value to be ascribed to the approximately 15% of the shares

assumed the accuracy and completeness of information it was provided about the Bank, and that KBW "did not attempt to verify independently any such information." *Id.* at 54a. The statement disclosed that KBW was to be paid $25,000, plus expenses, for rendering its opinion to FABI, and, if the merger was consummated, KBW would receive an additional $75,000. *Id.* at 54a-55a.

2. The plan of merger stimulated several legal challenges by minority shareholders. Before the merger, some shareholders, alleging that the price was not fair to them, unsuccessfully sought a state-court injunction against the merger; the same shareholders also unsuccessfully sought an equitable appraisal in state court after the merger had been completed. Pet. App. 6a, 31a-33a.[4] Following the merger, respondent Doris Sandberg filed an action in federal district court. She alleged violations of Section 14(a) of the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. 78n(a), and FDIC Rule 12 C.F.R. 335.206,[5] and raised a pendent state-law claim that the Bank's directors had

---

of [the Bank] not currently owned by [FABI]." After generally describing KBW's business and the sources of information and factors considered by KBW in formulating its opinion, the letter concluded: "[W]e are of the opinion that $42 per share represents a fair price for the shares of the [Bank] not currently owned by [FABI]." Pet. App. 74a-76a.

[4] The state court ruled that under Virginia law, holders of bank securities were not entitled to exercise statutory appraisal rights, and they did not have a common law appraisal action. Pet. App. 32a.

[5] Under Section 12(i) of the Exchange Act, 15 U.S.C. 78l(i), the FDIC's rules governed the Bank's proxy solicitation. Section 12(i) provides that the federal financial regulatory agencies shall have the "powers, functions, and duties vested in the Commission to administer and enforce" Section 14(a) (among others) of the Exchange Act, as it applies to proxy solicitations of federally regulated and insured banks and savings associations. The FDIC is responsible for insured state chartered banks that are not members of the Federal Reserve System. Section 12(i) provides that the FDIC's rules and regulations shall be "substantially similar" to those adopted by the SEC under Section 14(a) of the Exchange Act unless "implementation of substantially similar regulations * * * [is] not necessary or appropriate in the public interest or for protection of investors." The applicable FDIC rule is essentially identical to the SEC's proxy antifraud rule, 17 C.F.R. 240.14a-9.

breached their fiduciary duties in recommending the merger.[6] After a jury verdict in Sandberg's favor, the court entered judgment awarding her damages on both the federal and state claims in the amount of $43,956, representing an additional $18 per share. The court then applied the doctrine of collateral estoppel to grant the other respondents' motion for summary judgment against petitioners in the amount of $3,292,236. Pet. App. 7a-8a, 27a-28a.

3. The court of appeals affirmed the judgments in respondents' favor.[7] With respect to the Section 14(a) claim, the court held that a jury properly could have found two of the alleged misrepresentations in the proxy statement to be materially false or misleading. Pet. App. 15a-16a. The first was the representation that the board recommended the merger because it provided an opportunity for the minority shareholders "to achieve a high value for their shares." *Id.* at 53a. The court concluded that "[f]rom the evidence at trial, the jury was certainly justified in believing that the directors did not believe a merger at $42 per share was in the minority stockholders' interest but, rather, that they voted as they did for other reasons, *e.g.*, retaining their seats on the board." *Id.* at 15a.[8]

The second alleged misrepresentation concerned KBW. The court noted that the proxy statement said that FABI hired KBW "to pass on the fairness of the merger from a financial point of view"; it was disputed whether the opinion focused on fairness to the holding company or to the minority shareholders. The court remarked that KBW had relied only on the market price in valuing the stock and that other methods of analysis showed a higher value. The court also noted that "the independence of KBW was brought into question" because KBW had been told

---

[6] Sandberg sought to have her case certified as a class action, but the district court denied the request for certification.

[7] The court also reversed the district court's denial of class certification in the *Sandberg* case, and remanded for entry of an order certifying a class. Pet. App. 8a-11a.

[8] In discussing the state-law claims, the court also noted that "[t]he evidence fully supports a view that the directors exercised no independent judgment whatever with regard to the interests of the minority stockholders." Pet. App. 19a.

by FABI that it considered $42 per share to be a fair price and because KBW's contingent fee arrangement gave the firm a "substantial incentive to satisfy FABI." The court concluded that the issue whether "KBW's $42 valuation was something less than the product of a completely independent analysis" was one of fact, and added: "The representation in the proxy statement that it was such an independent determination could certainly have been found to be a material misrepresentation." Pet. App. 16a.

Petitioners also argued that Sandberg could not recover because she had voted against the merger and thus had not relied on the alleged misrepresentations in the proxy statement. Pet. App. 11a-14a. In rejecting this argument, the court separately noted that this Court had expressly reserved the question whether "causation could be shown where the management controls a sufficient number of shares to approve the transaction without any votes from the minority." *Id.* at 13a, quoting *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 385 n.7 (1970). Citing *Schlick* v. *Penn-Dixie Cement Corp.*, 507 F.2d 374, 383 (2d Cir. 1974), cert. denied, 421 U.S. 976 (1975), the court held that causation was established so long as the proxy statement was an "essential link" in accomplishing the corporate transaction. In this case, the court noted, it was conceded that the proxy statement was "an essential link" under state law. Pet. App. 13a n.1.

SUMMARY OF ARGUMENT

I. The antifraud provisions of the federal securities laws do not, as a general rule, impose an affirmative obligation on corporate directors to disclose in a proxy statement the reason, motive, or purpose for a corporate transaction. Disclosure is ordinarily not mandated unless an omission would render the representations that are made materially misleading, or unless applicable regulations require such a statement. But if directors make affirmative representations about such reasons, either voluntarily or because disclosure is required, then their statements must not be materially misleading. Statements of

reasons, as much as statements of objective facts, can be important to investors under the materiality standard of *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U.S. 438 (1976). Moreover, reasons are not immaterial simply because a proxy statement may disclose all of the "objective" facts relating to those reasons. Nor are they matters solely of speculation.

Santa Fe Industries, Inc. v. *Green*, 430 U.S. 462 (1977), does not hold that the reasons for a transaction are immaterial. There, the Court held that an alleged breach of state-law fiduciary duty, unaccompanied by deception, misrepresentation, or nondisclosure, does not state a violation of Section 10(b) of the Exchange Act, 15 U.S.C. 78j(b). Statements that are materially false or misleading, however, are not insulated from federal liability simply because the underlying facts would also support a state-law breach-of-fiduciary-duty claim.

A false characterization or adjective, such as the word "independent," can also be materially misleading. Neither the adjective "independent" nor the broad category of adjectives and characterizations is so unimportant or so incapable of misleading investors as to be immaterial as a matter of law.

II. In order to recover for a violation of Section 14(a) in the context of a freeze-out merger, minority shareholders must show that the false or misleading proxy statement actually caused their injury. The requisite showing of causation is not satisfied simply because the solicitation was, in some sense, necessary to the accomplishment of the merger. But minority shareholders can establish causation even if their votes would not have affected the outcome of the vote for which their proxies were solicited. Minority shareholders may be misled into voting in favor of the transaction, thereby losing an appraisal remedy under state law. Moreover, misleading information may keep minority shareholders from seeking to enjoin the transaction in state court or from employing a variety of other methods to alter the transaction's terms. The proxy provisions were intended to prevent such foreseeable economic injury to minority shareholders and to work in tandem with state remedies to make the voting process effective.

ARGUMENT

I. REPRESENTATIONS RESPECTING REASONS OR PURPOSES, AND ADJECTIVES OR CHARACTERIZATIONS, CAN BE MATERIALLY FALSE OR MISLEADING

In *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976), this Court held that "[a]n omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." The inquiry is a contextual one: it focuses on whether "disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *Ibid.*; see also *Basic Inc.* v. *Levinson*, 485 U.S. 224, 231-232 (1988) (applying the *TSC* materiality standard to Section 10(b) of the Exchange Act, 15 U.S.C. 78j(b), and Rule 10b-5, 17 C.F.R. 240.10b-5).

In this case, the court of appeals found that two of the alleged misrepresentations in petitioners' proxy statement raised materiality questions that were appropriate for resolution by the jury.[9] In our view, while there is some ambiguity surrounding the court's application of the *TSC* test, the arguments advanced by petitioners against the submission of their challenged statements to the jury—both with respect to disclosure of directors' "motivations" or "reasons," and with respect to the use of "adjectives" or "characterizations"—should be rejected.

A. A Statement Of Reasons Can Be Material

In arguing that the jury was improperly permitted to consider whether the directors misrepresented their reasons for approving the merger, petitioners have framed the issue as whether there is a duty to disclose directors' motivations in proxy statements.

[9] Under *TSC*, the materiality issues could be taken from the jury only if they were so "obviously" unimportant to shareholders that "reasonable minds cannot differ on the question of materiality." 426 U.S. at 450. The *TSC* Court cautioned that the issue of materiality "requires delicate assessments of the inferences a 'reasonable shareholder' would draw from a given set of facts and the significance of those inferences to him," matters that are "peculiarly ones for the trier of fact." *Ibid.*

Pet. (i). There is no general, affirmative duty under the antifraud provisions of the federal securities laws to disclose in a proxy statement the reason, motive, or purpose for a corporate transaction. That, however, is not equivalent to a licence to misrepresent such matters, or to mislead shareholders about them, when a board of directors is obligated or chooses to speak.[10] If an affirmative statement about reason or purpose is made, the statement must not be materially misleading.[11] Because petitioners made affirmative representations of their reasons for recommending the merger, this is not, as petitioners seem to suggest, a case that simply involves "omissions," and that raises only the question whether there was a duty to disclose. Rather, the question here is whether petitioners' *representations* were materially misleading. In our view, Section 14(a) does not embody the principle that a board of directors' stated reasons and purposes are immaterial as a matter of law.

1. a. A statement of reasons provided by a board of directors can be highly significant to investors. Individual investors frequently lack the time, information, or expertise to conduct complex investment analyses on their own. The board of directors, in contrast, has ready access to internal corporate information and may draw upon corporate resources and advisors to analyze that information quickly and thoroughly. Directors are also charged with a state-law responsibility to exercise business judgment in the interests of shareholders, thus infusing their rec-

[10] Disclosure ordinarily is not required unless an omission would render misleading the representations that are made, or unless a "line-item" disclosure rule promulgated by the SEC (or other agency) requires a statement of reasons, purpose, belief, or basis for belief. Cf. *Basic Inc.* v. *Levinson*, 485 U.S. 224, 239 n.17 (1988) ("[s]ilence, absent a duty to disclose, is not misleading under Rule 10b-5").

[11] See *Berg* v. *First American Bankshares, Inc.*, 796 F.2d 489, 496 (D.C. Cir. 1986) ("Once the proxy statement purported to disclose the factors considered by Casey, there was an obligation to portray them accurately. • • • The drafters of the proxy statement could not legitimately attribute to Casey factors which he did not actually consider, thereby making his decision appear well-informed, and then shield themselves by arguing that Casey's subjective motivations are not material.").

ommendations and underlying rationales with an added degree of credibility from the vantage point of shareholders. If directors disclose their reasons in an inaccurate or misleading way, the "total mix" of information available to shareholders may be significantly altered. *TSC*, 426 U.S. at 449. Particularly when shareholders must evaluate the fairness of a merger transaction that will convert their shares to cash, reasonable shareholders would attach significance to a board of directors' reasons for recommending that they accept the per-share price being offered.

Numerous Commission and FDIC rules recognize the importance to investors of representations regarding reasons.[12] For example, the SEC's Regulation 14A, 17 C.F.R. 240.14a-1 *et seq.* (governing the solicitation of proxies), and Schedule 14A, 17 C.F.R. 240.14a-101 (describing items to be set forth in a proxy statement), require disclosures relating to reason and purpose for a variety of transactions.[13] Indeed, in a merger of the type FABI proposed to the Bank, the FDIC's Form F-5 required that the proxy statement set forth the reasons for the merger plan. 12 C.F.R. 335.212, Item 14(a). Similarly, Item 14 of the SEC's Schedule 14A requires the proxy statement to summarize the material features of the proposed transaction, including a description of "[t]he reasons for engaging in the transaction." 17 C.F.R. 240.14a-101, Item 14(a)(3)(ii).

Furthermore, in a "going private" transaction, in which the issuer or an affiliate purchases the issuer's securities, the Commission's Rule 13e-3, 17 C.F.R. 240.13e-3, and Schedule 13E-3

[12] Cf. 17 C.F.R. 240.13d-1(a), 240.13d-101 Item 4 (requiring statement of purpose of acquiring more than 5% of certain issuers' securities).

[13] For example, Item 11, relating to the authorization of securities for purposes other than exchange for outstanding securities in the company, requires a description of the purpose of the proposed authorization. Item 12 requires in certain circumstances that a company state the reasons for proposing any modification of a class of its securities or any exchange of outstanding securities in the company for other securities. Item 16 requires a company to state the reasons for any restatement of its accounts. Item 19 requires a company to state the reasons for any proposed amendment to its bylaws or charter. 17 C.F.R. 240.14a-101, Items 11, 12, 16, and 19. In each of these instances, the party soliciting the proxy must make an affirmative statement relating to reason or purpose.

require the issuer or affiliate to state the purpose for the transaction, the reasons for the structure and timing of the transaction, and the reasons for rejecting any alternative means for accomplishing the same purpose. Schedule 13E-3 also requires the filer to state whether it reasonably believes the transaction is fair or unfair to the public shareholders, discussing in reasonable detail the material factors upon which the belief is based and the weight given to each factor. 17 C.F.R. 240.13e-100, Items 7(a), (b), and (c); 8(a) and (b). See also 12 C.F.R. 335.409 (FDIC counterpart). Thus, in the context of a freeze-out merger, such as this one, statements about the reasons for the transaction and the directors' belief about its fairness may be quite consequential. Moreover, because the rationale behind a recommendation is commonly understood to carry influence with shareholders, directors often choose to explain their reasons, even when not required to do so.

b. Statements of reasons or purpose are not rendered immaterial simply because a proxy statement may disclose all of the "objective" facts relating to those reasons. See Pet. 16. Cf. *Milkovich* v. *Lorain Journal Co.*, No. 89-645 (June 21, 1990), slip op. 16 (noting, in a defamation case, that "[e]ven if the speaker states the facts upon which he bases his opinion, * * * if his assessment of them is erroneous, the statement may still imply a false assertion of fact."). In an analogous context under the securities laws, courts have applied the "buried facts" doctrine in recognition that accurately disclosed facts may nevertheless mislead reasonable investors if scattered throughout a document, or confusingly arranged so as to obscure their meaning.[14] Similarly, a board's misstatement of its reasons may be materially misleading to reasonable shareholders, even if a comprehensive analysis of the disclosure document would reveal the basis for questioning the board's stated rationale.

[14] See, *e.g.*, *Kennedy* v. *Tallant*, 710 F.2d 711, 720 (11th Cir. 1983) (fact that defendants had gained control through a nominal investment disclosed only through pieces of information scattered throughout prospectus); *Mills* v. *Electric Auto-Lite Co.*, 403 F.2d 429, 433-435 (7th Cir. 1968) (proxy statement set forth directors' recommendation of merger without giving similar emphasis to relationship, disclosed later in proxy statement, between directors and other company in merger), vacated on other grounds, 396 U.S. 375 (1970).

To be sure, evaluation of the "total mix" may reveal that the relevant objective facts were disclosed with sufficient prominence to render a misrepresentation of reasons or purposes obviously unimportant, and, therefore, immaterial as a matter of law. Cf. *TSC*, 426 U.S. at 450. But such manifestly inconsistent disclosures are self-deterring because they call attention to the conflict between the directors' rationale and the objective facts. Hence, only the rare proxy statement will contain a sufficient factual disclosure to render misrepresentations about reasons immaterial.

c. Nor are reasons and purposes immaterial on the theory that proving a person's "true" reasons involves too great a degree of speculation. See Pet. 16. Documentary or testimonial evidence may eliminate the need for any "speculation"; for example, the board's contemporaneous notes may establish the basis for questioning its avowed rationale. When such evidence is absent or impeached, challenging a board's statement of reasons will involve greater resort to circumstantial evidence than, for example, challenging alleged misrepresentations with respect to a corporation's earnings. But neither federal antifraud rules nor the *TSC* standard for materiality makes an exception for statements concerning reason, purpose, or belief. Moreover, the lower federal courts have developed much experience in examining such matters, without undue difficulty.[15]

At the same time, the inquiry into reasons does not subject directors to judicial psychoanalysis; courts are fully capable of recognizing evidence that is too speculative to support a finding of a violation. See, *e.g.*, *Kas* v. *Financial General Bankshares, Inc.*, 796 F.2d 508, 518-519 (D.C. Cir. 1986) (concluding that it

[15] See, *e.g.*, *Galfand* v. *Chestnutt Corp.*, 545 F.2d 807, 813 (2d Cir. 1976) (proxy statement was false and misleading when it said that a mutual fund adviser sought a new contract because of cost increases beyond his control, but failed to disclose that the depreciation of fund's net assets was another reason); *Rubenstein* v. *IU Int'l Corp.*, 506 F. Supp. 311, 315 (E.D. Pa. 1980) (summary judgment for defendants was inappropriate when a question was raised whether the motivation for a corporate transaction was misrepresented). See also *SEC* v. *Parklane Hosiery Co.*, 558 F.2d 1083, 1086-1087 (2d Cir. 1977).

was mere speculation that a principal shareholder, whose favorable valuation of the freeze-out merger price was included in the proxy statement, was motivated by a "singular desire" to wind up his affairs due to ill health and age); *Berg* v. *First American Bankshares, Inc.*, 796 F.2d 489, 496 (D.C. Cir. 1986) ("Berg's allegation that Casey did not consider all the factors in the proxy statement is based on mere speculation[.]"). Directors need not fear, therefore, that every proxy statement is open to attack on the basis of a shareholder's unsupported surmise that the board harbored "ulterior" motives.

2. Petitioners' broader contention is that misleading disclosures about reasons and purposes, even though otherwise violating the plain language of federal antifraud provisions, are insulated from shareholders' suits under *Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 462 (1977). Pet. 13.

a. In *Santa Fe*, minority shareholders brought suit under Section 10(b) of the Exchange Act, 15 U.S.C. 78j, and Rule 10b-5, 17 C.F.R. 240.10b-5, seeking damages for alleged breaches of fiduciary duty in the course of a freeze-out merger.[16] This Court held that a breach of fiduciary duty, standing alone, is not sufficient to violate Section 10(b); to state a claim for violation of that provision, the complaint must adequately allege that the defendant's conduct was either "deceptive" or "manipulative"—a requirement that the complaint in *Santa Fe* did not satisfy.[17] 430 U.S. at 472, 474-476. The Court

[16] The plaintiffs alleged, among other things, that the majority shareholder had breached its fiduciary duty to the minority by effecting a merger without a justifiable business purpose. They also claimed breaches of fiduciary duty in the majority shareholder's failure to give prior notice of the merger and in its payment of a price substantially less than the fully disclosed appraised value. 430 U.S. at 470-471, 473-474, 476.

[17] The complaint in *Santa Fe* did not allege that the information accompanying the notice of merger involved material misstatements or omissions; thus, the Court found that the disclosures were not alleged to be materially "deceptive." 430 U.S. at 474-475. And, finding the term "manipulative" to refer in the securities context to practices that "artificially affect[] market activity in order to mislead investors," the Court held that there was no sufficient allegation of manipulation under Section 10(b). 430 U.S. at 477.

added that a cause of action for a breach of fiduciary duty, without more, does not flow from the Exchange Act's underlying " 'philosophy of full disclosure'; once full and fair disclosure has occurred, the fairness of the terms of the transaction is at most a tangential concern of the statute." *Id.* at 478. Moreover, the Court indicated, to permit shareholders to sue for a simple fiduciary breach "would be to bring within [Rule 10b-5] a wide variety of corporate conduct traditionally left to state regulation." *Ibid.*

b. Following *Santa Fe*, courts have properly dismissed actions under Rule 10b-5 or Rule 14a-9 based solely on allegations that the corporation or its directors failed to disclose improper motives or omitted mention of breaches of fiduciary duties owed to shareholders. At the same time, courts have generally recognized that misrepresentations or omissions that make disclosed facts misleading may be material, and actionable, under the federal securities laws, even when the challenged statements might also form the basis for a state-law claim of breach of fiduciary duty.[18]

Some courts, however, appear to have carried the rationale of *Santa Fe* farther than is warranted. For example, *Panter* v. *Marshall Field & Co.*, 646 F.2d 271, 289 (7th Cir.), cert. denied, 454 U.S. 1092 (1981), stated that even when defendants have made allegedly deceptive or misleading statements, "if 'the central thrust of a claim or series of claims arises from acts of corporate mismanagement, the claims are not cognizable under [the] federal [securities] law[s].' " [19] The D.C. Circuit, while rejecting

[18] See, *e.g.*, *Craftmatic Securities Litigation* v. *Kraftsow*, 890 F.2d 628, 639 (3d Cir. 1989) ("Although allegations of failure to disclose mismanagement alone do not state a claim under federal securities law, a claim that defendants failed to disclose material facts may be actionable * * * *Santa Fe* cannot be read to stay our hand in remedying violations of federal law[.]"); *Kas* v. *Financial General Bankshares, Inc.*, 796 F.2d at 512 ("We do not, however, read *Santa Fe* to preclude an action under the Securities Exchange Act based on a material nondisclosure or misrepresentation simply because the undisclosed facts involved might also support a breach of fiduciary duty claim.").

[19] See also *Kademian* v. *Ladish Co.*, 792 F.2d 614, 623-624 (7th Cir. 1986) (finding inadequate the allegation that a proxy statement's disclosure of a company's reasons for supporting a merger was misleading: "[i]f plaintiffs are correct, [the reasons given] are misleading because they are not the *true* rea-

any approach that looks to the "central thrust" of a claim,[20] and acknowledging that a misrepresentation or nondisclosure may violate federal law even if it involves a fiduciary breach, has at the same time read *Santa Fe* to imply that "liability under the federal securities laws should not turn on the resolution of essentially state-law issues." *Kas* v. *Financial General Bankshares, Inc.*, 796 F.2d at 513. Thus, the court indicated, if the "claim of material misstatement or nondisclosure" would require "a legal determination that the transaction was unfair to a minority shareholder or that an officer or director's conduct amounted to a breach of his fiduciary duty," the allegation fails to state a claim for relief. *Ibid.*[21] A third, and different, approach has evaluated the adequacy of the claim for relief by considering whether accurate disclosure could have supported a state-court injunctive remedy. See *Field* v. *Trump*, 850 F.2d 938, 948 (2d Cir. 1988), cert. denied, 109 S. Ct. 1122 (1989); *Kamerman* v. *Steinberg*, 891 F.2d 424, 431 (2d Cir. 1989).[22]

c. No clear consensus emerges from these decisions. In our view – a view consistent with most of the lower court holdings – *Santa Fe* does not suggest that a statement that is materially false or misleading is insulated from liability under federal law simply because the underlying facts would also support a

sons the majority wants the merger"); *Biesenbach* v. *Guenther*, 588 F.2d 400, 402 (3d Cir. 1978) (finding inadequate the allegation that although the board had represented that a transaction was in the "best interests" of shareholders, it had failed to disclose that the purpose of corporate loans and other activities was to entrench management).

[20] See *Berg* v. *First American Bankshares, Inc.*, 796 F.2d at 498 n.8 (criticizing that approach as requiring speculation about motives).

[21] The *Kas* court also said that a court should dismiss claims of *nondisclosure* based on allegedly omitted " 'true' motivations of the directors," because such claims "would require a court to probe the business judgment of the directors." 796 F.2d at 513. But the court did not address falsely or misleadingly presented reasons or motives of the type alleged here.

[22] Cf. *Santa Fe*, 430 U.S. at 474 n.14, discussed at note 42, *infra*. In our view, the availability of a state court remedy is more appropriately considered under the rubric of causation (see p. 25, *infra*) than in determining whether a false or misleading disclosure is "material" to a shareholder's voting decision (in an action under Section 14(a)) or to his trading decision (in an action under Section 10(b)).

breach-of-fiduciary-duty claim under state law. First, the language of the federal antifraud provisions admits of no such "reverse" preemption of the securities laws. Cf. *Adams Fruit Co.* v. *Barrett*, 110 S. Ct. 1384, 1390 (1990). The SEC's antifraud rule for proxy statements prohibits "*any* statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to *any* material fact, or which omits to state *any* material fact necessary in order to make the statements therein not false or misleading[.]" 17 C.F.R. 240.14a-9(a) (emphasis added); see 12 C.F.R. 335.206 (FDIC counterpart). A materially false statement does not fall outside the ambit of this prohibition just because it also indicates a violation of applicable fiduciary duties.[23] Second, any such extension of *Santa Fe* would greatly dilute the protection against misleading disclosure that federal law affords to investors. In many instances, false or misleading statements by directors will accompany breaches of state-law duties, for corporate misconduct often creates the incentive to avoid adequate disclosure. It would be ironic if directors could convert their violations of state duties into a shield from federal liability to shareholders who were misled by inaccurate descriptions of their wrongdoing. Third, an "exception" that extends *Santa Fe* to statements that *are* materially misleading would threaten to engulf the rule. Few allegations of false statements could not be reformulated as allegations of breaches of a state-law duty by defendants seeking to avoid liability.

Nothing in *Santa Fe* requires such incongruous results. That case did not involve deceptive or manipulative statements. Indeed, the Court distinguished lower court cases finding violations of Rule 10b-5 where a breach of fiduciary duty had "included some element of deception," 430 U.S. at 475; the Court reaffirmed the principle that "the statute provides a cause of action for any plaintiff who 'suffer[s] an injury as a result of deceptive practices touching its sale [or purchase] of

[23] Indeed, Congress intended state and federal remedies to supplement each other. 15 U.S.C. 78bb(a) ("The rights and remedies provided by this chapter shall be in addition to any and all other rights and remedies that may exist at law or in equity[.]").

securities[.]' " *Id.* at 476, quoting *Superintendent of Insurance* v. *Bankers Life & Cas. Co.*, 404 U.S. 6, 12-13 (1971)[24] Moreover, the possibility of "federalizing" state corporate law that troubled the Court in *Santa Fe* is not present when the defendants' disclosures are found to be materially misleading or false. The determination that a court must make in that setting is whether directors have complied with antifraud regulations that further the "fundamental purpose" of the Exchange Act to promote "full and fair disclosure." *Santa Fe*, 430 U.S. at 478; *Basic Inc.* v. *Levinson*, 485 U.S. at 230. Making that determination does not invade or supplant state-law fiduciary duty requirements; it simply protects shareholders' access, guaranteed by federal law, to materially accurate and adequate disclosure.

3. In light of these principles, the claim here that the Board of Directors falsely or misleadingly said that the merger was approved "*because* it provides an opportunity for the Bank's public shareholders to achieve a high value for their shares," Pet. App. 53a (emphasis added), was properly sent to the jury.[25] The record, as interpreted by the court of appeals, raised an issue for the jury whether the proxy statement was false because the board approved the merger for other than its stated reason.[26]

[24] The failure to distinguish mere nondisclosure from affirmative deception has generated some confusion over the materiality of "motives" or "reasons" under the securities laws. For example, several of the cases cited by petitioners, though containing broad language, are explainable on the rationale that there is no general duty to make disclosure of reasons or motives. See *Data Probe Acquisition Corp.* v. *Datatab, Inc.*, 722 F.2d 1, 5 (2d Cir. 1983), cert. denied, 465 U.S. 1052 (1984); *Golub* v. *PPD Corp.*, 576 F.2d 759, 765 (8th Cir. 1978); *Alabama Farm Bureau Mutual Cas. Co.* v. *American Fidelity Life Ins. Co.*, 606 F.2d 602, 608, 610-611 (5th Cir. 1979), cert. denied, 449 U.S. 820 (1980); see also *Kas*, 796 F.2d at 513, discussed at note 21, *supra*. As we have indicated, the securities laws generally do not require affirmative disclosure of reasons or purposes. There is no basis, however, for insulating materially false or misleading statements by directors who speak on such matters.

[25] The jury was instructed to consider whether this statement "was false or misleading, because the claimed high values for the shares was not the reason for [the director's] approval[.]" J.A. 421.

[26] As petitioners interpret the opinion below, the court of appeals affirmed liability on the theory that even though all material facts were disclosed, the directors had a duty to disclose their "subjective motivations and beliefs." Pet.

Whether this misrepresentation was material was also a jury question. Other disclosures in the proxy tatement, such as those bearing on the directors' potential conflicts of interest, may not have been adequate to render the misstatement about the directors' reasons unimportant. If the directors acted for reasons of self-interest, the fact that shareholders were advised of that *potential* is not adequate disclosure. Since the federal proxy provisions are not ousted simply because the circumstances surrounding a misstatement might also support a state-law claim, the jury was properly permitted to determine whether this misstatement was material under the *TSC* standard.[27] See *TSC*, 426 U.S. at 450.

B. Characterizations And Adjectives Can Be Material

The second alleged misstatement, as described by petitioners, involves the characterization of KBW as "independent." Petitioners appear to contend that a characterization or adjective, such as "independent," can never be materially misleading under the federal antifraud provisions. We disagree.

1. *TSC*'s materiality requirements are not limited to subjects, verbs, and objects. An adjective or adverb used to qualify a particular piece of information may significantly color its meaning. Indeed, one of the principal issues analyzed in *TSC* was whether a claim that shareholders would realize a "substantial" premium over market values was materially misleading in light of the underlying facts. 426 U.S. at 454-460. Of course,

12-13. Quite apart from the fact that the directors' business reasons are not "subjective motives," the court never said that all material facts were adequately disclosed. What the court did say is that the jury was entitled to believe the Board acted for other than the *disclosed* reasons. See Pet. App. 14a (noting that FABI "orchestrated" the merger, and that the directors were more concerned with their own interests than those of the shareholders). Other facts discussed in the opinion support this view. See *id.* at 19a (discussing fiduciary duty claim; "[t]he evidence fully supports a view that the directors exercised no independent judgment whatsoever with regard to the interests of the minority stockholders").

[27] We recognize that there is much conflicting evidence in the record on these questions. But if, as we believe, the questions were properly submitted to the jury, the conflicts were for the jury to resolve.

some characterizations of disclosed facts are inherently too vague or inconsequential to be materially false or misleading. But the word "independent" lacks such an inherent quality.

For example, in financial accounting the word "independent," as used to describe an accountant, conveys specific and highly material information about the relationship between accountant and client and about the accountant's professional skepticism while conducting the audit.[28] Moreover, if an investment banking firm were owned by its client, a description of the firm as "independent" clearly could be a material misrepresentation.[29] A holding that the word "independent," or more broadly, all adjectives and characterizations, are not material as a matter of law would open a significant loophole in the federal scheme to protect investors against deception.

Of course, an inaccurate adjective or characterization would be immaterial when it does not "significantly alter[ ] the 'total mix' of information made available." *TSC*, 426 U.S. at 449; *Basic Inc.*, 485 U.S. at 232. In some cases, a court could justifiably look with skepticism on a claim that an inapt modifier prevented reasonable investors from reaching a balanced appreciation of the matters disclosed in a proxy statement. Moreover, in a particular case, it might be possible to demonstrate that all the objective facts were accurately disclosed in a way that

[28] Pursuant to the Commission's Regulation S-X, 17 C.F.R. 210.2-01(b), the Commission will not recognize an accountant as independent with respect to a client if, at relevant times, "he, his firm, or a member of his firm had * * * any direct financial interest or any material indirect financial interest [in that client, or] * * * was connected as a promoter, underwriter, voting trustee, director, officer, or employee." Similarly, under generally accepted auditing standards as approved and adopted by the American Institute of Certified Public Accountants (AICPA), "[i]n all matters relating to [an] assignment, an independence in mental attitude is to be maintained by the auditor or auditors." See also AICPA, *Codification of Statements on Auditing Standards*, AU § 220.03, at p. 19 (1987).

[29] Cf. *McMahan & Co. v. Wherehouse Entertainment, Inc.*, 900 F.2d 576 (2d Cir. 1990) (holding that the word "independent" was used to describe a company's directors in a misleading way).

defeats a claim of materiality based on a poorly chosen modifier. See p. 12, *supra*.[30]

2. Here, the court of appeals did not express with precision its reasons for concluding that a jury could have found the proxy statement's description of KBW to be materially false or misleading. If, as petitioners contend, the court meant to restrict its criticism of the proxy statement to the use of the adjective "independent," the result it reached was incorrect. KBW was not affiliated with FABI in the sense of common ownership or control, and, taken in context, the proxy statement's use of the word "independent" would be understood by reasonable investors to signify that KBW was an unaffiliated firm.[31] Considering the "total mix," the use of the word "independent" standing alone was not sufficient to mislead.

But in our view, petitioners' reading of the opinion is not the most natural one. The court began its discussion of KBW by quoting the proxy statement's representation that FABI had engaged KBW "to pass on the fairness of the merger from a financial point of view"; the court did not quote the proxy statement's use of the word "independent."[32] Rather, after dis-

[30] Cf. *Lessler* v. *Little*, 857 F.2d 866, 875-876 (1st Cir. 1988) (the description of an investment advisory contract as bona fide rather than a "guise" or "sham" to divert assets was not misleading in light of the full disclosure of the contract's terms), cert. denied, 109 S. Ct. 1130 (1989). Of course, the matrix of disclosed facts must be readily comprehensible to investors; as Judge Friendly noted, "it is not sufficient that overtones might have been picked up by the sensitive antennae of investment analysts." *Gerstle* v. *Gamble-Skogmo, Inc.*, 478 F.2d 1281, 1297 (2d Cir. 1973). Consequently, courts have recognized that even where all of the facts are disclosed, emphasis and gloss can give rise to liability. See *Isquith* v. *Middle South Utilities, Inc.*, 847 F.2d 186, 203 (5th Cir.), cert. denied, 488 U.S. 926 (1988); *Gillette Co.* v. *RB Partners*, 693 F. Supp. 1266, 1287 (D. Mass. 1988).

[31] Moreover, the proxy statement disclosed the terms of KBW's contingent fee arrangement, which the court thought gave KBW an incentive to satisfy FABI's wishes; the statement also explained that KBW had been retained by FABI (not the Bank) and had relied on the integrity of information provided by FABI without independently verifying it.

[32] The court did say that the jury could have found the representation that KBW's valuation was an "independent determination" to be a material misrepresentation. Pet. App. 16a. But that statement, which not was not a quotation

cussing the facts surrounding KBW's relationship with FABI, the court stated that it was an issue of fact whether the $42 value ascribed to the Bank stock "was something less than the product of a completely independent analysis." Pet. App. 16a. In view of the jury instructions, see note 32, *supra*, the court's discussion, taken as a whole, is most reasonably interpreted as follows: A reasonable shareholder could have formed the impression from the proxy statement that KBW had *originated* the $42 price per share as a result of its analysis, and had expressed its opinion that this price, in particular, was fair to minority shareholders. The record, however, indicated that an officer of FABI told KBW at the outset that FABI believed that a price in the $40 per share range would be fair; KBW, in turn, believed that "any price above the market would be fair" since FABI's controlling interest gave it the power to dictate the terms of the transaction (see J.A. 259-260, 319-320, 347). Such undisclosed facts would support an inference that KBW did not so much pass on the merger's "fairness," as simply ratify FABI's desired price. In that setting, we believe it to have been a jury question whether the proxy statement's representations regarding KBW's role in the transaction were materially misleading.[33]

II. TO RECOVER FOR A VIOLATION OF SECTION 14(a), MINORITY SHAREHOLDERS MUST SHOW THAT THE VIOLATION CAUSED THEM INJURY, BUT THEY MAY MAKE SUCH A SHOWING EVEN WHEN THEY LACK SUFFICIENT VOTING STRENGTH TO BLOCK THE TRANSACTION TO WHICH A PROXY STATEMENT RELATED

In *Mills* v. *Electric Auto-Lite, Inc.*, 396 U.S. 375, 385 n.7 (1970), this Court reserved the question whether causation in a private action under Section 14(a) can be demonstrated when

of language in the proxy statement, should be read in light of the instruction to the jury that it was to consider *two* allegedly false representations: that "the proxy statement falsely stated that [KBW], the investment banking firm hired by the buyer was independent *and* had passed on the fairness of the merger." J.A. 422 (emphasis added).

[33] Again, the evidence on these points was conflicting, but the resolution of those conflicts was for the jury.

the allegedly misled shareholders could not by their votes have blocked the transaction as to which proxies were solicited.[34] Two polar positions on causation have been advanced in this case; neither, in our view, appropriately implements the purposes of the proxy rules.

On the one hand, petitioners' principal argument is that, no matter how flagrant the violation and how direct the injury, minority shareholders whose votes could not defeat a proposed transaction should never be permitted to recover. They assert that a violation of Section 14(a) causes actionable injury only if it might affect the outcome of the vote. In our view, that is too narrow a view of causation under Section 14(a). Truthful and complete disclosure may affect the ability of a controlling shareholder to consummate a proposed transaction in a variety of practical and legal ways that fully satisfy the requisite causal nexus. To deny recovery in such instances would be contrary to the purposes of the proxy rules. It would "insulate from private redress an entire category of proxy violations," *Mills*, 396 U.S. at 382—thus effectively giving management carte blanche in such cases to abuse the proxy process and deceive voting minorities.[35]

The court of appeals, on the other hand, apparently concluded that causation was established in this case on the theory that because the proxy statement was required by state law, the statement was an "essential link" in consummating the merger.[36] This formulation supports a finding of causation simply because a misleading proxy statement was issued; it does not consider whether accurate and adequate disclosure would have made a difference in whether the merger was consummated or injury suffered. Such a rule fails to satisfy the threshold requirement that the violation charged actually caused the injury.

[34] In *Schlick* v. *Penn-Dixie Cement Corp.*, 507 F.2d 374, 381-384 (2d Cir. 1974), cert. denied, 421 U.S. 976 (1975), the court answered this question in the affirmative. Prior to the decision below, no other circuit had addressed the question.

[35] Of course, the Commission would still be free to seek relief, but as this Court noted in *J.I. Case Co.* v. *Borak*, 377 U.S. 426, 432 (1964), "[p]rivate enforcement of the proxy rules provides a necessary supplement to Commission action," because, then as now, the SEC does not have the resources to determine the facts surrounding each of the thousands of proxy statements it reviews.

[36] As we have noted, the court's impression (fostered by the parties' concession) that state law required the proxy solicitation (Pet. App. 5a, 13a, n.1) was erroneous. See note 2, *supra*.

A. Nonvoting Causation Theories Are Consistent With The Purposes of The Exchange Act

1. The determination whether minority shareholders may permissibly show causation in seeking recovery under Section 14(a) must be made in light of the purposes of that provision.[37] As this Court explained in *Mills*, 396 U.S. at 381:

> § 14(a) stemmed from the congressional belief that "[f]air corporate suffrage is an important right that should attach to every equity security bought on a public exchange." H.R. Rep. No. 1383, 73d Cong., 2d Sess., 13 [(1934)]. The provision was intended to promote "the free exercise of the voting rights of stockholders" by ensuring that proxies would be solicited with "explanation to the stockholder of the real nature of the questions for which authority to cast his vote is sought." *Id.*, at 14; S. Rep. No. 792, 73d Cong., 2d Sess., 12 [(1934)].[38]

The proxy provisions function as an overlay to state law in the field of corporate suffrage. See Loss, *The SEC Proxy Rules and State Law*, 73 Harv. L. Rev. 1249 (1960). State corporate law identifies the circumstances in which matters must be put to a vote of shareholders, authorizes the directors or other persons to seek proxies from shareholders, and provides remedies for violations of state-law duties in connection with such corporate

[37] Such an analysis has roots in the tort-law concept that for a plaintiff to recover for a statutory violation, his injuries must be of the type the statute was designed to prevent. See *Gorris* v. *Scott*, 9 L.R.-Ex. 125 (1874). Similar principles have been applied under federal regulatory statutes. See *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977); *Atlantic Richfield Co.* v. *USA Petroleum Co.*, 110 S. Ct. 1884 (1990) (both cases defining antitrust injury under the Clayton Act, 15 U.S.C. 4, by reference to the purposes of a particular antitrust prohibition).

[38] See also *J.I. Case Co.* v. *Borak*, 377 U.S. 426, 431 (1964); *TSC*, 426 U.S. at 444.

action. Federal law defines the disclosure obligations that attach to the proxy-solicitation process and ensures that elections and other corporate voting matters are carried out in accordance with federal regulations prescribed "as necessary or appropriate in the public interest or for the protection of investors." 15 U.S.C. 78n(a).[39] The proxy rules thus work in tandem with state law to protect investors' rights; the proxy rules do not override the fundamental role of the States in regulating corporate governance, but serve to guarantee that the processes provided by state corporate law are meaningful ones.[40]

2. In light of those purposes, we believe that several types of "nonvoting" causation are sufficient in an action under Section 14(a).

a. A shareholder may be induced by a defective proxy statement to vote in favor of a transaction, thereby precluding his resort to an appraisal remedy under state law. Where appraisal is afforded, States uniformly require that the shareholder vote against the proposed corporate transaction as a prerequisite to asserting dissenters' rights. See 2 Model Business Corp. Act Ann. § 13.21, at 1394 (1985) (statutory comparison). A shareholder who forfeits such rights as a consequence of a deficient

[39] Stock exchanges may also require listed companies to solicit proxies for all stockholder's meetings. See New York Stock Exchange Constitution and Rules (CCH), ¶ 2565, at p. 4239-4240 (1990) (reproducing § 802.00 from NYSE Listed Company Manual); American Stock Exchange Constitution and Rules (CCH), ¶ 10,195, at p. 3722 (1989) (reproducing § 705 from AMEX Company Guide).

[40] An additional purpose of the proxy rules is to see that shareholders are adequately informed about corporate activities. See S. Rep. No. 1455, 73d Cong., 2d Sess. 74 (1934) ("In order that the stockholder may have adequate knowledge as to the manner in which his interests are being served, it is essential that he be enlightened * * * as to the major questions of policy, which are decided at stockholders' meetings."). Section 14(c), which was added to the Exchange Act in 1964, 78 Stat. 570, carries forward this purpose by requiring that when an issuer is not soliciting proxies (typically where the minority shareholders' votes are unnecessary), it must distribute an information statement to shareholders, containing the information that would be contained in a proxy statement. 15 U.S.C. 78n(c). Such information statements may not be false or misleading as to any material fact. See 17 C.F.R. 240.14c-6.

proxy statement clearly suffers loss "caused by" the violation of Section 14(a).[41]

b. Similarly, a shareholder's ability to enjoin a corporate transaction in state court may be frustrated by false proxy disclosures. Such a chain of causation has long been recognized in damages claims under Section 10(b) of the Exchange Act and Rule 10b-5.[42] Permitting such a theory does not convert the proxy process into a state-court discovery device (Pet. 21); it simply recognizes that authorization for a corporate transaction can be blocked, even by a minority, based on facts revealing a violation of state law. If the source of those facts is accurate disclosure as required by federal proxy rules, the purposes of the proxy rules and of state law are furthered. Hence, a shareholder should be permitted to show that he was denied the opportunity to enjoin the action for which shareholder authorization was sought.[43]

[41] See, *e.g.*, *Cole* v. *Schenley Industries, Inc.*, 563 F.2d 35, 40-41 (2d Cir. 1977); Note, *Causation and Liability in Private Actions for Proxy Violations*, 80 Yale L.J. 107, 117-118 (1970). Cf. *Swanson* v. *American Consumers Industries, Inc.*, 475 F.2d 516 (7th Cir. 1973) (claim that proxy statement misled shareholders into voting for transaction, resulting in loss of their statutory appraisal rights, stated a cause of action under Rule 10b-5).

[42] See, *e.g.*, *Healey* v. *Catalyst Recovery of Pennsylvania, Inc.*, 616 F.2d 641, 647 (3d Cir. 1980); *Alabama Farm Bureau Mutual Cas. Ins. Co.* v. *American Fidelity Life Ins. Co.*, 606 F.2d at 614; *Kidwell ex rel. Penfold* v. *Meikle*, 597 F.2d 1273, 1290-1294 (9th Cir. 1979); *Goldberg* v. *Meridor*, 567 F.2d 209, 218-220 (2d Cir. 1977), cert. denied, 434 U.S. 1069 (1978); *Wright* v. *Heizer Corp.*, 560 F.2d 236, 250 (7th Cir. 1977), cert. denied, 434 U.S. 1066 (1978). See also *Madison Consultants* v. *FDIC*, 710 F.2d 57, 64-65 (2d Cir. 1983); see generally Note, *Suits for Breach of Fiduciary Duty Under Rule 10b-5 After* Santa Fe Industries, Inc. v. Green, 91 Harv. L. Rev. 1874 (1978).

Moreover, this Court stated in *Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 462, 474 n.14 (1977), that the shareholders' concession that "under Delaware law they could not have enjoined the merger" indicated that the omitted fact alleged in that case was not a material one.

[43] The lower courts have disagreed on how strong a showing of likelihood of success in such a state action is required to establish causation. See Gelb, *Rule 10b-5 and* Santa Fe – *Herein of Sue Facts, Shame Facts, and Other Matters*, 87 W. Va. L. Rev. 189, 209 (1985). In many cases, however, the showing necessary to establish that a disclosure was false or misleading and material will necessarily determine the facts that would have entitled the shareholders to state-court relief.

c. Beyond those forms of causation, the proponents of corporate action may for a variety of reasons by unwilling to proceed with a transaction on the same terms if truthful disclosure is made in their proxy statement. A company may have an established policy not to force through certain transactions or proposals without minority approval. Alternatively, the facts surrounding a particular transaction may demonstrate that the controlling shareholders view the minority's approbation necessary as a practical matter.[44]

3. The foregoing causation theories are fully compatible with the view that the shareholders' injury under Section 14(a) must arise out of "distortion of the voting process." Pet. 20. The voting process, fully and fairly understood, encompasses not only the casting of ballots. As in any election, much important activity occurs before the vote and can affect its outcome, even where a majority appears firm. The ability of shareholders to use information in a proxy statement to secure judicial remedies under state law—to postpone or block a vote, or to change the proposal—is encompassed within the voting process. Likewise, the impact that a vocal minority can have—whether through publicity, threat of contingent liability, resort to government intervention, or simple suasion of a majority desirous of consensus—is also part of that process.[45] These causal theories, therefore, are consistent with Section 14(a)'s purposes.

---

[44] Such considerations may stem from a desire to minimize contingent liability to dissenting shareholders under state appraisal remedies, see, *e.g.*, *Cole* v. *Schenley Industries, Inc.*, 563 F.2d at 39-40, or from a desire to avoid adverse publicity that might result from truthful disclosure. See, *e.g.*, *United States* v. *Margala*, 662 F.2d 622, 626-627 (9th Cir. 1981) (sustaining a criminal conviction for proxy violations based, in part, on the fact that adverse publicity regarding fraudulent scheme would have blocked the transaction); *Schlick* v. *Penn-Dixie Cement Corp.*, 507 F.2d at 384 ("We cannot assume that even a rapacious controlling management would necessarily want to hang its dirty linen out on the line[.]").

[45] This theory gives substantive content to the premise, underlying enactment of the federal securities laws, that disclosure has a deterrent effect. See Douglas, *Directors Who Do Not Direct*, 47 Harv. L. Rev. 1305, 1324 (1934) ("The prophylactic effects [of publicity] will equal in importance any other single measure which can be adopted."); Frankfurter, *The Federal Securities Act: II*, 8 Fortune 53, 55 (1933); see also Securities and Exchange Commission, *Disclosure to Investors: A Reappraisal of Administrative Policies Under the '33 and '34 Acts* 10 (1969) ("[A]ppropriate publicity tends to deter questionable practices and to elevate standards of business conduct"); Cf. L. Brandeis, *Other People's Money and How the Bankers Use It* 92 (10th printing 1934) ("Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.").

In contrast, injuries based on the theory that a misleading proxy statement affected the market price of publicly traded shares, and harmed investors in their trading, should not be recognized as satisfying the causation requirement under Section 14(a). See *Cowin* v. *Bresler*, 741 F.2d 410, 427 (D.C. Cir. 1984). Section 14(a) focuses on the solicitation of proxies in order to authorize corporate action, not on an investor's trading decisions.[46]

B. The Court Of Appeals Applied An Incorrect Causation Theory

Although causation can be established where the minority shareholders lack dispositive voting power, the causal theory applied below was incorrect. The court of appeals sustained liability on the theory that causation was shown because the proxy was an "essential link" in the transaction. Pet. App. 14a. As the court appeared to use that term, its analysis was incorrect.[47]

---

[46] Petitioners argue (Pet. 21-22) that just as tender offerors were held, in *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1 (1977), not to be within the class of persons Section 14(e) protects, minority shareholders without voting power are not within the class Section 14(a) protects. Section 14(a), however, has as one of its "chief purposes" the protection of *all* shareholders. *J.I. Case Co.* v. *Borak*, 377 U.S. at 432; see *TSC*, 426 U.S. at 448. In *Piper*, the Court concluded that Congress specifically intended to preclude bidders from bringing damages actions against target companies under the Williams Act. Here, in contrast, nothing evinces a congressional intent to deny minority shareholders a remedy for deceptive proxy materials aimed at them.

[47] The court of appeals also held that individual reliance is not required in an action under Section 14(a), and the certiorari petition does not challenge that holding. As applied to this case, we agree that a shareholder need not establish that the misleading statement induced him to support the proposal. If the shareholders were unable to block the transaction because the defendants withheld or misstated material facts, the violation caused their injury, regardless of the absence of individual reliance. In this respect, reliance generally does not play the role in proving causation under Section 14(a) that it plays under Section 10(b). Cf. *Basic Inc.* v. *Levinson*, 485 U.S. at 243. In Section

c. Beyond those forms of causation, the proponents of corporate action may for a variety of reasons by unwilling to proceed with a transaction on the same terms if truthful disclosure is made in their proxy statement. A company may have an established policy not to force through certain transactions or proposals without minority approval. Alternatively, the facts surrounding a particular transaction may demonstrate that the controlling shareholders view the minority's approbation necessary as a practical matter.[44]

3. The foregoing causation theories are fully compatible with the view that the shareholders' injury under Section 14(a) must arise out of "distortion of the voting process." Pet. 20. The voting process, fully and fairly understood, encompasses not only the casting of ballots. As in any election, much important activity occurs before the vote and can affect its outcome, even where a majority appears firm. The ability of shareholders to use information in a proxy statement to secure judicial remedies under state law—to postpone or block a vote, or to change the proposal—is encompassed within the voting process. Likewise, the impact that a vocal minority can have—whether through publicity, threat of contingent liability, resort to government intervention, or simple suasion of a majority desirous of consensus—is also part of that process.[45] These causal theories, therefore, are consistent with Section 14(a)'s purposes.

---

[44] Such considerations may stem from a desire to minimize contingent liability to dissenting shareholders under state appraisal remedies, see, *e.g.*, *Cole* v. *Schenley Industries, Inc.*, 563 F.2d at 39-40, or from a desire to avoid adverse publicity that might result from truthful disclosure. See, *e.g.*, *United States* v. *Margala*, 662 F.2d 622, 626-627 (9th Cir. 1981) (sustaining a criminal conviction for proxy violations based, in part, on the fact that adverse publicity regarding fraudulent scheme would have blocked the transaction); *Schlick* v. *Penn-Dixie Cement Corp.*, 507 F.2d at 384 ("We cannot assume that even a rapacious controlling management would necessarily want to hang its dirty linen out on the line[.]").

[45] This theory gives substantive content to the premise, underlying enactment of the federal securities laws, that disclosure has a deterrent effect. See Douglas, *Directors Who Do Not Direct*, 47 Harv. L. Rev. 1305, 1324 (1934) ("The prophylactic effects [of publicity] will equal in importance any other single measure which can be adopted."). Frankfurter, *The Federal Securities Act: II*, 8 Fortune 53, 55 (1933); see also Securities and Exchange Commission, *Disclosure to Investors: A Reappraisal of Administrative Policies Under the '33 and '34 Acts* 10 (1969) ("[A]ppropriate publicity tends to deter questionable practices and to elevate standards of business conduct"); Cf. L. Brandeis, *Other People's Money and How the Bankers Use It* 92 (10th printing 1934) ("Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.").

In contrast, injuries based on the theory that a misleading proxy statement affected the market price of publicly traded shares, and harmed investors in their trading, should not be recognized as satisfying the causation requirement under Section 14(a). See *Cowin* v. *Bresler*, 741 F.2d 410, 427 (D.C. Cir. 1984). Section 14(a) focuses on the solicitation of proxies in order to authorize corporate action, not on an investor's trading decisions.[46]

B. The Court Of Appeals Applied An Incorrect Causation Theory

Although causation can be established where the minority shareholders lack dispositive voting power, the causal theory applied below was incorrect. The court of appeals sustained liability on the theory that causation was shown because the proxy was an "essential link" in the transaction. Pet. App. 14a. As the court appeared to use that term, its analysis was incorrect.[47]

---

[46] Petitioners argue (Pet. 21-22) that just as tender offerors were held, in *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1 (1977), not to be within the class of persons Section 14(e) protects, minority shareholders without voting power are not within the class Section 14(a) protects. Section 14(a), however, has as one of its "chief purposes" the protection of *all* shareholders. *J.I. Case Co.* v. *Borak*, 377 U.S. at 432; see *TSC*, 426 U.S. at 448. In *Piper*, the Court concluded that Congress specifically intended to preclude bidders from bringing damages actions against target companies under the Williams Act. Here, in contrast, nothing evinces a congressional intent to deny minority shareholders a remedy for deceptive proxy materials aimed at them.

[47] The court of appeals also held that individual reliance is not required in an action under Section 14(a), and the certiorari petition does not challenge that holding. As applied to this case, we agree that a shareholder need not establish that the misleading statement induced him to support the proposal. If the shareholders were unable to block the transaction because the defendants withheld or misstated material facts, the violation caused their injury, regardless of the absence of individual reliance. In this respect, reliance generally does not play the role in proving causation under Section 14(a) that it plays under Section 10(b). Cf. *Basic Inc.* v. *Levinson*, 485 U.S. at 243 In Section

The "essential link" test derives from this Court's decision in *Mills*, where the votes of the allegedly misled shareholders were necessary to approve a particular transaction. The Court stated: "Where there has been a finding of materiality, a shareholder has made a sufficient showing of causal relationship between the violation and the injury for which he seeks redress if, as here, he proves that the proxy solicitation itself, rather than the particular defect in the solicitation materials, was an essential link in the accomplishment of the transaction." 396 U.S. at 385. The *Mills* "essential link" test is thus shorthand for a theory that permits causation to be inferred when the violation was likely to have influenced the votes of shareholders whose approval was necessary to consummate the transaction. Such a presumption, which responds largely to the practical problems of proving the result of a hypothetical election, see *ibid.*, does not apply to a case in which minority shareholders lack the votes to affect the contest's outcome.[48]

The jury instructions in this case, however, permitted a finding of causation if the proxy solicitation was an "essential link" in the accomplishment of the merger, and required for that finding only that the solicitation of minority shareholders was "necessary." J.A. 426. Accordingly, the judgment, to the extent that it depends on the validity of those instructions, cannot stand.[49]

10(b) cases, involving fraud in connection with the purchase or sale of securities, individual reliance is needed to link plaintiff's trading decision to the violation. In contrast, in a proxy-violation case, "[t]he damage suffered results not from the deceit practiced on [plaintiff] alone but rather from the deceit practiced on the stockholders as a group." *J.I. Case Co.* v. *Borak*, 377 U.S. at 432.

[48] Likewise, we do not believe that minority shareholders are entitled to a presumption of causation under the alternative causal theories we have discussed above, as the problems of presenting direct proof encountered in *Mills*, 396 U.S. at 385, are not present. Cf. *Basic Inc.* v. *Levinson*, 485 U.S. at 245 (discussing purposes of presumptions).

[49] We express no view as to whether petitioners have properly preserved this claim of error, or whether, if they have, the case should be reversed outright or remanded for a new trial based on an alternative causation theory.

CONCLUSION

The jury was properly permitted to determine whether the proxy statement was materially false or misleading. But the judgment below was in error to the extent that it permitted the jury to find causation solely on the basis that the statement was "necessary" to accomplish the transaction.

Respectfully submitted.

WILLIAM C. BRYSON
*Acting Solicitor General**

JAMES R. DOTY
General Counsel

DAVID L. SHAPIRO
Deputy Solicitor General

PAUL GONSON
Solicitor

MICHAEL R. DREEBEN
Assistant to the Solicitor General

JACOB H. STILLMAN
Associate General Counsel

ERIC SUMMERGRAD
LUCINDA O. MCCONATHY
Assistant General Counsels

JOSEPH A. FRANCO
Special Counsel

ANDREW S. BENNETT
Attorney
Securities and Exchange Commission

ALFRED J. T. BYRNE
General Counsel

DOUGLAS H. JONES
Senior Deputy General Counsel

DOROTHY L. NICHOLS
Associate General Counsel

COLLEEN B. BOMBARDIER
Senior Counsel
Federal Deposit Insurance Corporation

JUNE 1990

---

* The Solicitor General is disqualified in this case.

U.S. GOVERNMENT PRINTING OFFICE 1990 — 262 203:00955

No. 89-1448

MOTION FILED
JUN 25 1990

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

VIRGINIA BANKSHARES, INC., *et al.*,
Petitioners,
v.
DORIS I. SANDBERG, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE AMERICAN CORPORATE COUNSEL ASSOCIATION AND AMERICAN SOCIETY OF CORPORATE SECRETARIES, INC. IN SUPPORT OF PETITIONERS

NANCY A. NORD
(Counsel of Record)
Executive Director
AMERICAN CORPORATE
COUNSEL ASSOCIATION
1225 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 296-4522

DONALD D. GEARY
President
AMERICAN SOCIETY OF CORPORATE
SECRETARIES, INC.
1270 Avenue of the Americas
New York, NY 10020
(212) 765-2620

June 25, 1990

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1448

VIRGINIA BANKSHARES, INC., *et al.*,
Petitioners,

v.

DORIS I. SANDBERG, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 37.2 of the Rules of this Court, the American Corporate Counsel Association and the American Society of Corporate Secretaries, Inc. respectfully move for leave to file the attached brief amicus curiae. Counsel for petitioners has granted consent to file. Consent was requested from counsel for respondents, but no response to that request has been received.

The American Corporate Counsel Association ("ACCA") is a national bar association devoted exclusively to the professional activities of attorneys on the legal staffs of corporations and other business entities in the private

sector. ACCA has approximately 7,800 members employed as corporate counsel by some 3,500 organizations and 34 local chapters across the country. Many of these members are the chief legal officers of their client corporations. ACCA's members are intimately involved in giving legal advice and formulating company policy on disclosure matters and in advising management on pending litigation.

The American Society of Corporate Secretaries, Inc. ("ASCS") is a professional association which was formed over 40 years ago and which is composed principally of corporate secretaries, corporate counsel and other business executives involved in duties normally associated with the corporate secretarial function. ASCS's 3,300 members, representing more than 2,400 corporations in the United States and Canada, are frequently responsible for the proper conduct of board of director meetings and the solicitation of proxies on behalf of the corporations they serve. Many ASCS members are officers of the corporations they represent; some are also members of ACCA.

In their professional activities, members of ACCA and ASCA are confronted on a regular basis with issues concerning the disclosure of material facts required by the federal securities laws, including federal proxy legislation. Thus, the members of ACCA and ASCS have a strong interest in defending state corporate governance statutes that limit civil liabilities of corporate officers and directors. Like 37 other states, Virginia has placed a ceiling on directors' and officers' liabilities to encourage competent persons to assume positions of responsibility in business corporations and to avoid chilling their performance of their duties. The sweeping implied cause of action recognized by the lower court in this case nullifies these statutory protections and exposes the clients of ACCA and ASCS members to liabilities that are contrary to state public policy.

The attached brief amicus curiae addresses the federalism issues raised by the court of appeals' ruling from the perspective of persons who have direct experience with the practical impact of stockholder litigation and state legislation designed to place reasonable constraints on such litigation.

Respectfully submitted,

NANCY A. NORD
(Counsel of Record)
Executive Director
AMERICAN CORPORATE
COUNSEL ASSOCIATION
1225 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 296-4522

DONALD D. GEARY
President
AMERICAN SOCIETY OF CORPORATE
SECRETARIES, INC.
1270 Avenue of the Americas
New York, NY 10020
(212) 765-2620

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. THE IMPLIED RIGHT OF ACTION RECOGNIZED BY THE COURT OF APPEALS NULLIFIES STATE LAW AND CONFLICTS WITH FUNDAMENTAL PRINCIPLES OF FEDERALISM	3
II. THE UNRESTRAINED LIABILITIES AND VAGUE SUBSTANTIVE REQUIREMENTS IMPOSED BY THE COURT OF APPEALS THREATEN TO DEGRADE THE QUALITY OF DISCLOSURE IN PROXY STATEMENTS	7
CONCLUSION	11
APPENDIX	1a

TABLE OF AUTHORITIES

CASES: Page

Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975) 10
CTS Corps. v. Dynamics Corp., 481 U.S. 69 (1987) .. 4
Dirks v. SEC, 463 U.S. 646 (1983) 10
Ernst & Ernst v. Hockfelder, 425 U.S. 185 (1976) .. 10
Gould v. American-Hawaiian S.S. Co., 535 F.2d 7661 (3d Cir. 1976) 10
Santa Fe Industries v. Green, 430 U.S. 462 (1977) .. 2, 4, 7
Sedima S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479 (1985) 10
TSC Corps. v. Dynamics Corp., 481 U.S. 438 (1976) 9
Ultramares Corp. v. Touche, 255 N.Y. 170 (1931) .. 10

STATUTES:

Ariz. Rev. Stat. Ann. § 10-054(A)(9) (Supp. 1989) 1a
Ark. Stat. Ann. § 4-27-202(B)(3) (Supp. 1989) 1a
Cal. Corp. Code (West Supp. 1990)
§ 204(a)(10) 1a
§ 204.5 ..... 1a
Colo. Rev. Stat. § 7-3-101(u) (Supp. 1989) 1a
Del. Code Ann. tit. 8, § 102(b)(7) (Supp. 1988) .. 1a
Fla. Stat. Ann. § 607.1645 (West 1990) 1a
Ga. Code Ann. § 14-2-202(b)(4) (1989) 1a
Idaho Code § 30-1-54(2) (Supp. 1989) 2a
Ind. Code Ann. § 23-1-35-1(e) (Burns Supp.1988) .. 5, 2a
Iowa Code Ann. (West Supp. 1989)
§ 491.5(8) 2a
§ 496A.49(13) 2a
Kan. Stat. Ann. § 17-6002(b)(8) (1988) 2a
La. Rev. Stat. Ann. § 12:24(c)(4) (West Supp. 1990) 2a
Me. Rev. Stat. Ann. tit. 13-A, § 716 (Supp. 1989) .. 2a
Md. Corps. & Ass'ns Code Ann. (Supp. 1989)
§ 2-104(b)(8) 2a
§ 2-405.2 ..... 2a

TABLE OF AUTHORITIES—Continued

Page

Mass. Gen. Laws Ann. ch. 156B, § 13(b)(1½) (West Supp. 1989) 2a
Mich. Comp. Laws Ann. § 450.1209(c) (West Supp. 1989) 2a
Minn. Stat. Ann. (West Supp. 1990)
§ 302A.111(4)(u) 3a
§ 302A.251(4) 3a
Mont. Code Ann. (1989)
§ 35-1-202(2)(a)(v) 3a
§ 35-1-202(2)(b) 3a
Neb. Rev. Stat. § 21-2035(2) (Supp. 1988) 3a
Nev. Rev. Stat. Ann. (Michie Supp. 1989)
§ 78.036(1) 5
§ 78.037(1) 3a
N.J. Stat. Ann. § 17-9A-3(A)(10) (West Supp. 1989) 3a
N.M. Stat. Ann. § 53-12-2(E) (Supp. 1989) 3a
N.Y. Bus. Corp. Law § 402(b) (McKinney Supp. 1990) 3a
N.C. Gen. Stat. (1990)
§ 55-2-02(b)(3) 3a
§ 55-8-30(e) 3a
Ohio Rev. Code Ann. § 1701.59(D) (Anderson Supp. 1989) 5
Okla. Stat. Ann. tit. 18, § 1006(B)(7) (West. Supp. 1990) 4a
Or. Rev. Stat. Ann. § 60.047(2)(c) (1988) 4a
42 Pa. Cons. Stat. Ann. § 8364 (Purdon Supp. 1989) 4a
R.I. Gen. Laws § 7-1.1-48(a)(6) (Supp. 1988) 4a
S.D. Codified Laws Ann. § 47-2-58.8 (Supp. 1989) .. 4a
Tenn. Code Ann. § 48-12-102(b)(3) (1988) 4a
Tex. Rev. Civ. Stat. Ann. art. 1302-7.06 (Vernon Supp. 1990) 4a
Utah Code Ann. § 16-10-49.1 (Supp. 1989) 4a
Va. Code Ann. § 13.1-692.1 (1989) 5, 4a

TABLE OF AUTHORITIES—Continued

	Page
Wash. Rev. Code Ann. § 23A.12.020(10) (d) (Supp. 1989)	5a
Wis. Stat. Ann. § 180.307 (West Supp. 1989)	5a
Wyo. Stat. § 17-16-834 (1989)	5a
LEGISLATIVE HISTORY:	
78 Cong. Rec. 7863 (1934)	10
H.R. Rep. No. 1383, 73d Cong., 2d Sess. (1934)	10
MISCELLANEOUS:	
Goolsby, *Virginia Corporation Law & Practice* (Prentice-Hall)	4, 5
Hanks, *Evaluating Recent State Legislation on Director and Officer Liability Limitation and Indemnification*, 43 Bus. Law. 1207 (1988)	5, 6
Note, *The Limitation of Directors' Liability: A Proposal for Legislative Reform*, 66 Tex. L. Rev. 411 (1987)	6
Note, *New York's Responses to the Director and Officer Liability Crisis*, 54 Brooklyn L. Rev. 1305 (1989)	6
Sahlman, *Why Sane People Shouldn't Serve on Public Boards*, Harvard Business Review 28 (May-June 1990)	10

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

No. 89-1448

VIRGINIA BANKSHARES, INC., *et al.*,
Petitioners,

v.

DORIS I. SANDBERG, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE AMERICAN CORPORATE COUNSEL ASSOCIATION AND THE AMERICAN SOCIETY OF CORPORATE SECRETARIES, INC. AS AMICI CURIAE IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST

As explained in the foregoing motion for leave to file a brief amicus curiae, the American Corporate Counsel Association ("ACCA") and the American Society of Corporate Secretaries, Inc. ("ASCS") have a strong interest in the issues raised by the petition for a writ of certiorari. The court of appeals' ruling raises significant uncertainties regarding the corporate responsibilities of members of both organizations and also frustrates state legislation designed to protect the officers and directors

they counsel against unconstrained liabilities harmful to shareholders, depositors, and employees of affected companies.

SUMMARY OF ARGUMENT

By its recognition of an implied federal cause of action exceeding the scope of prior decisions of this Court and other circuits, the court of appeals has disregarded legislation of the Commonwealth of Virginia designed to protect against the adverse effects of open-ended civil liabilities for corporate officers and directors. This Court has warned against creation of implied causes of action that usurp the public policies embodied in state laws and has insisted on the application of principles of federalism in this very context. The Fourth Circuit's disregard of these principles of federalism brings its ruling into conflict with this Court's decision in *Santa Fe Industries v. Green*, 430 U.S. 462 (1977).

The Virginia corporate governance statutes that have been circumvented by the Fourth Circuit's ruling do not stand alone. Thirty-seven other states have adopted similar laws as part of recent corporate law reform initiatives. These statutes protect shareholders, depositors and employees of affected companies by constraining liabilities that deter competent persons from assuming positions of responsibility in business corporations.

The court of appeals not only has overridden state law and policy by its broad construction of the federal securities laws, but also has rendered a decision that is certain to impair the quality of disclosure in proxy statements. The court's ruling joins together vague substantive standards and unrestrained civil liability. By combining unpredictable legal requirements with unlimited personal liability, the court has placed enormous pressure on persons who make use of the proxy system to fill their disclosure documents with exculpatory rhetoric that is distracting and confusing to investors and that obscures the communication of material factual information.

ARGUMENT

I. THE IMPLIED RIGHT OF ACTION RECOGNIZED BY THE COURT OF APPEALS NULLIFIES STATE LAW AND CONFLICTS WITH FUNDAMENTAL PRINCIPLES OF FEDERALISM.

The substance of the complaint in these cases is that minority shareholders of the First American Bank of Virginia received inadequate compensation for their shares when the bank merged with a subsidiary of its parent company holding 85% of the outstanding shares, and that the bank's directors labored under a conflict of interest when they approved the merger. These are the traditional elements of a state-law complaint for appraisal or breach of fiduciary duty.

However, the Fourth Circuit has stretched these state-law claims into federal securities claims. First, the court found that the bank's directors engaged in securities fraud by failing in the proxy statement to characterize their own conduct as a breach of fiduciary duty and by affirmatively characterizing the transaction they approved as "fair." Second, the court found that millions of dollars in damages must be paid for the alleged defects in the proxy statement, even though the individual plaintiffs concededly had not relied upon the proxy statement (indeed, had affirmatively voted against the proposed merger), the vote of the minority shareholders could not have influenced the merger, and the shareholders had tried without success to enjoin the merger or secure an appraisal remedy in state court.

The practical effect of "federalizing" this controversy is to nullify carefully considered policy determinations of the Virginia legislature and to encourage the circumvention of state courts in the resolution of state-law claims. As explained by the Virginia Circuit Court, the Virginia General Assembly, in order to protect depositors against impairment of bank capital, has withheld an ap-

praisal remedy of the very type now mandated by the Fourth Circuit. Pet. App. 32a. Moreover, the Virginia legislature has placed a cap on the liability of corporate directors at $100,000 (or one-year's compensation) to protect against unlimited personal liabilities. *Id.* at 23a. The Fourth Circuit's creation of an implied remedy under the federal securities laws end-runs both of those limitations. Ironically, the court below acknowledged that these limitations applied precisely to this fact situation, yet it applied them only to the stockholder's state-law claims and placed no limitations whatsoever on their "implied" federal cause of action. *Id.* at 23a, 29a.

The Fourth Circuit's expansive ruling threatens to undermine not only the legislative policies of the Commonwealth of Virginia, but also those of many other states that have struggled to restrain the sharp escalation in directors' liability. If state-law claims may be transmuted into securities claims by the boot-strap theories employed in these cases, the corporate law of these states will suffer serious and unjustifiable injury.

As this Court has explained, "[c]orporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law *expressly* requires certain responsibilities of directors with respect to shareholders, state law will govern the internal affairs of the corporation." *Santa Fe Industries, Inc. v. Green*, 530 U.S. 462, 479 (1977). "A state has an interest in promoting stable relationships among the parties involved in the corporation it charters, and [e]very state in this country has enacted laws regulating corporate governance." *CTS Corps. v. Dynamics Corp.*, 481 U.S. 69, 89, 91 (1987). Among the most important corporate governance statutes enacted in the last decade are laws designed to shield corporate directors against excessive civil liabilities.

When Virginia passed its director liability law, "the market for directors' and officers' liability insurance was in disarray." Goolsby, *Virginia Corporation Law & Practice* 10.1, p. 126 (Prentice-Hall). The people of Virginia perceived a pressing need for liability reform because of "genuine concern that a mistake in judgment, when viewed with the benefit of hindsight, could trigger financial ruin for individual directors." *Id.* at 127. The Virginia General Assembly responded by imposing a mandatory cap on liability and by allowing shareholders to further reduce damages exposure by amending corporate bylaws. The legislature made an exception only for "knowing" and "willful" misconduct. Va. Code Ann. §13.1-692.1.[1]

Virginia's law is indicative of a national trend. "One of the principal themes of corporate governance in the second half of this decade has been protection of corporate directors and officers from personal liability for money damages." Hanks, *Evaluating Recent State Legislation on Director and Officer Liability Limitation and Indemnification*, 43 Bus. Law. 1207 (1988). In addition to Virginia, Delaware, and Indiana—the first states to adopt such laws—"forty other states have adopted some form of legislation designed to reduce the risks of directors' personal liability for money damages." *Id.* at 1209. Some of these states have adopted self-executing limitations on liability. Others authorize shareholders to adopt their own limitations. *Id.* at 1210. Regardless of

[1] The Virginia act applies broadly to "any proceeding" brought by or on behalf of shareholders against corporate officers or directors. The legislature withdrew protection only in narrow circumstances. "Because the unprotected conduct involved intentional wrongdoing, the business leaders were not concerned that such conduct would trigger unlimited liability." Goolsby, *supra* at p. 127, n. 13. Many other states withdraw protection only from willful and wanton conduct. *See, e.g.*, Nev. Rev. Stat. § 78.036(1) (Supp. 1989) ("intentional misconduct, fraud or a knowing violation of law"); Ind. Con. Ann. § 23-1-35-1(e) Burns Supp. 1988) ("Willful misconduct or recklessness"); Ohio Rev. Code Ann. § 1701.59(D) Anderson Supp. 1989) ("deliberate intent to cause injury to the corporation or undertaken with reckless disregard for the best interests of the corporation").

form, these laws indicate a growing national concern with respect to this area of corporate governance.

The state legislatures adopting these statutes did not do so with the intent to provide self-serving prescriptions for the personal welfare of corporate directors. Rather, these laws were enacted to protect the welfare of *shareholders* by ensuring that they receive the benefit of competent management and reasonable insurance costs. As a result of escalating liability triggered by expansive judicial rulings in the early part of the past decade, director and officer (D&O) insurance became prohibitively costly. "For many companies, especially start-up and smaller companies, the insurance was no longer affordable, and some companies were not able—and may still be unable—to obtain quotes at any price. According to *The Wall Street Journal*, premiums for D&O insurance increased over 360% in one year. Almost immediately, outside directors of many major publicly-held corporations began to resign or not stand for reelection rather than continue to serve with inadequate or no insurance." *Id.* at 1209.

Staggering liability risks for board members have had a deleterious impact on the welfare of the companies they serve. "With the onslaught of litigation and lack of protection, some corporations have found it harder not only to prevent directors from resigning, but also to attract talented board members." Note, *New York's Responses to the Director and Officer Liability Crisis*, 54 Brooklyn L. Rev. 1305, 1315.[2] In view of the overriding need to retain qualified directors and to purchase insurance at reasonable cost, shareholders have voted overwhelmingly to protect their interests by exercising statutory options to limit directors' liability. See Note, *The*

[2] This study notes that "[w]hen the Armada Corporation's D&O Policy was cancelled last year, 80 percent of the Board's members resigned in fear of personal liability exposure." *Id.* at 1316 n. 62.

Limitation of Directors' Liability: A Proposal for Legislative Reform, 66 Tex. L. Rev. 411, 438 (1987) ("Of the corporations that presented or plan to present charter provisions to shareholders under the new Delaware law, initial signs indicate that nearly ninety percent [of those corporations] have opted for no-liability provisions.").[3]

The broad-based reform movement to rationalize liability rules applicable in stockholder litigation would suffer a stunning setback if the Fourth Circuit's judgment in this case were permitted to stand. By inviting into federal court what is actually a controversy over breach of fiduciary duty, the Fourth Circuit has eviscerated Virginia's policy determination that appraisal remedies should *not* be available in bank merger cases and that individual directors should *not* be exposed to unconstrained class action liabilities. It also has encouraged litigants wishing to sidestep state courts to bring their state-law complaints in an already overburdened federal court system under an implied cause of action theory. It is a profound understatement to say, as in *Santa Fe Industries*, that "this extension of the federal securities laws would overlap and quite possibly interfere with state corporate law." 430 U.S. at 479.

II. THE UNRESTRAINED LIABILITIES AND VAGUE SUBSTANTIVE REQUIREMENTS IMPOSED BY THE COURT OF APPEALS THREATEN TO DEGRADE THE QUALITY OF DISCLOSURE IN PROXY STATEMENTS.

In addition to nullifying state law and policy, the Fourth Circuit's decision is certain to impair the quality of disclosure in corporate proxy statements. This conse-

[3] The chart set forth in the appendix of this brief summarizes liability restrictions in 37 states. The policies of those states would be circumvented by the Fourth Circuit's ruling in this case. That ruling could be used to transform almost any claim of breach of fiduciary duty into a federal securities case. Evasion of state law liability limitations would become an exercise in artful pleading.

quence flows from the debilitating combination of unlimited personal liabilities and unpredictable legal requirements approved by the court of appeals. In this litigation, $13,000,000 may change hands based on a jury's disagreement with the proxy statement's selection of adjectives and its expression of opinion on the issue of financial fairness. To make matters worse, the court has countenanced the jury's speculation that some individuals on the 21-member board of directors in this case possessed hidden subjective motivations. Pet. App. 15a.

As a practical matter, corporate directors and officers have no means to protect themselves against this kind of liability. After-the-fact review of virtually any disclosure document, in the contentious environment of a class-action lawsuit, will inevitably generate disagreement over opinions, adjectives and characterizations. And in virtually any case, it is possible for plaintiff's counsel to invite the jury to speculate that some members of a multi-member board of directors acted (at least in part) on unexpressed personal motivations.

Corporate directors and officers faced with sweeping personal liability resting on such a doubtful and unpredictable basis will be placed under severe pressure to include in their proxy statement disclaimers designed to mitigate exposure to damages. The threat of unpredictable liability rulings already has impaired the readability and usefulness of disclosure documents. The Fourth Circuit's decision in this case will worsen that trend. For example, corporate officers seeking to avoid liability of the kind imposed in this case may feel obliged to interject a disclaimer of the following kind:

> In addition to the financial factors discussed in this proxy statement, some members of the Board of Directors may have considered the impact of the merger on their own personal situation, including their continued tenure on the Board of Directors.

This kind of exculpatory rhetoric would do little to assist investors in making rational decisions. The implication that personal ulterior motivations may have played a role in the directors' judgment would, in most instances, be simply wrong, and the disclaimer would be too indefinite to serve any purpose other than minimizing the danger of massive civil liability. The proxy statement used in this case, which advised investors of the *objective fact* that the directors would retain their seats under the merger plan, enabled investors to form their own judgment without engaging in distracting and potentially misleading speculation. Pet. App. 38a, 55a-56a, 59a.

By the same token, the quality of disclosure would be reduced by placing legal pressure on corporate directors to refrain from using adjectives such as the word "independent." The investment banker firm in this case was a prominent, outside, unaffiliated financial advisor, and those circumstances were aptly conveyed by the challenged choice of words. If shareholders wished to discount the investment banker's opinion on the issue of fairness because the banker had been retained by the controlling shareholder, had received information from the controlling shareholder, and had received compensation from the controlling shareholder on a contingent-fee basis, the proxy statement enabled shareholders to make that judgment by setting forth the underlying objective data. Pet. App. 38a, 54a, 55a, 74a, 75a.

This Court warned in *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 448-449 (1976), that excessive liability in proxy suits may have adverse effects on the quality of corporate disclosures: "not only may the corporation and its management be subjected to liability for insignificant omissions or misstatements, but also substantial liability may cause it to bury the shareholders in an avalanche of trivial information—a result that is hardly conducive to informed decision-making." Corporate officers and other persons soliciting proxies (includ-

ing stockholders challenging corporate management in proxy contests) are entitled to precise legal standards that protect against unpredictable personal liability and provide guidance as to what must be disclosed: "imprecision prevents parties from ordering their action in accord with legal requirements." *Dirks* v. *SEC*, 463 U.S. 646, 658 n.17 (1983). Combining large, open-ended personal liability with unpredictable legal standards "presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 739 (1975). See also *Sedima, S.P.R.L.* v. *Imrex Co., Inc.*, 473 U.S. 479, 506-507 (1985) (Marshall, Brennan, Blackmun and Powell, J.J., dissenting).[4]

The court of appeals lost sight of these considerations when it sustained liability in this litigation. The practical result of the court's ruling will be to raise compliance costs while undermining the quality of corporate disclosures—results that are directly contrary to the congressional goal of protecting investor welfare while avoiding unnecessary burdens on legitimate business activity.[5]

---

[4] The sponsors of the Securities Exchange Act of 1934 made clear that they did not intend such draconian results. See, *e.g.*, 78 Cong. Rec. 7863 (remarks of Rep. Wolverton) (1934) describing Congress's goal as not only protection of investors but also "protection of legitimate business" and observing that "[t]he uppermost thought that has dominated our individual and collective decisions has been a desire to correct existing evils, or conditions that have proved harmful, without destroying, curtailing, or handicapping legitimate business"). Accord, H.R. Rep. No. 1383, 73d Cong., 2d Sess. 3, 13 (1934).

[5] The court of appeals' successive rejection of legal doctrines designed to place reasonable limitations on civil liability poses a serious threat of vexatious litigation. As discussed in the petition for certiorari, the court not only eroded the misrepresentation requirement and discarded any requirement of causation, but also approved collateral estoppel and class action procedures on the broadest possible scale (Pet. App. 8a-11a, 21a-22a). Since federal courts have rejected any requirement of proof of intent to defraud in proxy cases such as this one (*see, e.g., Gould v. American-Hawaiian S.S. Co.*, 535 F.2d 7661, 777-778 (3d Cir. 1976)), a plaintiff seeking a multi-million dollar award of damages in the Fourth Circuit has almost no burden of proof at all. As this Court warned in *Ernst & Ernst v. Hockfelder*, 425 U.S. 185, 215 n.33 (1976): " 'The hazards of business conducted on those terms are so extreme as to enkindle doubt whether a flaw may not exist in the implication of a duty that exposes to these consequences' " (quoting *Ultramares Corp. v. Touche*, 255 N.Y. 170, 179-180 (1931) (Cardozo, J.)). See also, Sahlman, *Why Sane People Shouldn't Serve on Public Boards*, Harvard Business Review 28 (May-June 1990).

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted,

NANCY A. NORD
(Counsel of Record)
Executive Director
AMERICAN CORPORATE
COUNSEL ASSOCIATION
1225 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 296-4522

DONALD D. GEARY
President
AMERICAN SOCIETY OF CORPORATE
SECRETARIES, INC.
1270 Avenue of the Americas
New York, NY 10020
(212) 765-2620

APPENDIX

APPENDIX

STATE STATUTES LIMITING CIVIL LIABILITIES OF CORPORATE DIRECTORS*

ARIZONA Ariz. Rev. Stat. Ann. § 10-054(A)(9) (Supp. 1989)	Charter Option
ARKANSAS Ark. Stat. Ann. § 4-27-202(B)(3) (Supp. 1989)	Charter Option
CALIFORNIA Cal. Corp. Code §§ 204(a)(10), 204.5 (West Supp. 1990)	Charter Option
COLORADO Colo. Rev. Stat. § 7-3-101(u) (Supp. 1989)	Charter Option
DELAWARE Del. Code Ann. tit. 8, § 102(b)(7) (Supp. 1988)	Charter Option
FLORIDA Fla. Stat. Ann. § 607.1645 (West 1990)	Self-Executing
GEORGIA Ga. Code Ann. § 14-2-202(b)(4) (1989)	Charter Option

* "Charter option" statutes permit shareholders to curtail or eliminate liability by charter amendment. "Self executing" statutes operate by their own force to curtail liabilities.

IDAHO Idaho Code § 30-1-54(2) (Supp. 1989)	Charter Option
INDIANA Ind. Code Ann. § 23-1-35-1(e) (Burns Supp. 1988)	Self-Executing
IOWA Iowa Code Ann. §§ 491.5(8), 496A.49(13) (West Supp. 1989)	Charter Option
KANSAS Kan. Stat. Ann. § 17-6002(b)(8) (1988)	Charter Option
LOUISIANA La. Rev. Stat. Ann. § 12:24(c)(4) (West Supp. 1990)	Charter Option
MAINE Me. Rev. Stat. Ann. tit. 13-A, § 716 (Supp. 1989)	Self-Executing
MARYLAND Md. Corps. & Ass'ns Code Ann. §§ 2-104(b)(8), -405.2 (Supp. 1989)	Charter Option
MASSACHUSETTS Mass. Gen. Laws Ann. ch. 156B, § 13(b)(1½) (West Supp. 1989)	Charter Option
MICHIGAN Mich. Comp. Laws Ann. § 450.1209(c) (West Supp. 1989)	Charter Option

MINNESOTA Minn. Stat. Ann. §§ 302A.111(4)(u), .251(4) (West Supp. 1990)	Charter Option
MONTANA Mont. Code Ann. § 35-1-202(2)(a)(v), (2)(b) (1989)	Charter Option
NEBRASKA Neb. Rev. Stat. § 21-2035(2) (Supp. 1988)	Charter Option
NEVADA Nev. Rev. Stat. Ann. § 78.037(1) (Michie Supp. 1989)	Charter Option
NEW JERSEY N.J. Stat. Ann. § 17-9A-3(A)(10) (West Supp. 1989)	Charter Option
NEW MEXICO N.M. Stat. Ann. § 53-12-2(E) (Supp. 1989)	Charter Option
NEW YORK N.Y. Bus. Corp. Law § 402(b) (McKinney Supp. 1990)	Charter Option
NORTH CAROLINA N.C. Gen. Stat. (1990) §§ 55-2-02(b)(3), 55-8-30(e)	Charter Option
OHIO Ohio Rev. Code Ann. § 1701.59(D) (Anderson Supp. 1989)	Self-Executing

OKLAHOMA Okla. Stat. Ann. tit. 18, § 1006(B)(7) (West. Supp. 1990)	Charter Option
OREGON Or. Rev. Stat. Ann. § 60.047(2)(c) (1988)	Charter Option
PENNSYLVANIA 42 Pa. Cons. Stat. Ann. § 8364 (Purdon Supp. 1989)	Charter Option
RHODE ISLAND R.I. Gen. Laws § 7-1.1-48(a)(6) (Supp. 1988)	Charter Option
SOUTH DAKOTA S.D. Codified Laws Ann. § 47-2-58.8 (Supp. 1989)	Charter Option
TENNESSEE Tenn. Code Ann. § 48-12-102(b)(3) (1988)	Charter Option
TEXAS Tex. Rev. Civ. Stat. Ann. art. 1302-7.06 (Vernon Supp. 1990)	Charter Option
UTAH Utah Code Ann. § 16-10-49.1 (Supp. 1989)	Charter Option
VIRGINIA Va. Code Ann. § 13.1-692.1 (1989)	Self-Executing

WASHINGTON Wash. Rev. Code Ann. § 23A.12.020(10)(d) (Supp. 1989)	Charter Option
WISCONSIN Wis. Stat. Ann. § 180.307 (West Supp. 1989)	Self-Executing
WYOMING Wyo. Stat. § 17-16-834 (1989)	Charter Option

(11)

No. 89-1448

MOTION FILED JUN 25 1990

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

VIRGINIA BANKSHARES, INC., *et al.*,
Petitioners,

v.

DORIS I. SANDBERG, *et al.*,
Respondents.

FIRST AMERICAN BANKSHARES, INC., *et al.*,
Petitioners,

v.

PAUL H. WEINSTEIN, *et al.*,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE AMERICAN BANKERS ASSOCIATION, THE ASSOCIATION OF BANK HOLDING COMPANIES, AND ASSOCIATION OF RESERVE CITY BANKERS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

RICHARD M. WHITING
ASSOCIATION OF BANK HOLDING COMPANIES
730 15th Street, N.W.
Suite 820
Washington, D.C. 20005
(202) 393-1158

JOHN J. GILL III
Counsel of Record
MICHAEL F. CROTTY
AMERICAN BANKERS ASSOCIATION
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 663-5026

CHARLES L. MARINACCIO
STEPHEN V. R. WHITMAN
KELLEY, DRYE & WARREN
2300 M Street, N.W.
Washington, D.C. 20036
(202) 955-9600

Counsel for Amici Curiae

June 25, 1990

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1448

VIRGINIA BANKSHARES, INC., *et al.*,
Petitioners,

v.

DORIS I. SANDBERG, *et al.*,
Respondents.

FIRST AMERICAN BANKSHARES, INC., *et al.*,
Petitioners,

v.

PAUL H. WEINSTEIN, *et al.*,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

The American Bankers Association, the Association of Bank Holding Companies, and Association of Reserve City Bankers respectfully move, pursuant to Rule 37.3 of the Rules of this Court, for leave to file a brief as amici curiae in support of Petitioners. Counsel for Petitioners has granted consent to file this brief. Counsel for Respondents has been noncommittal to our request for consent.

The three sponsoring organizations jointly appeared as amici curiae in this case with leave of the Court

prior to the consideration of the petition for writ of certiorari. The American Bankers Association is the principal national trade association for commercial banks in the United States; the Association of Bank Holding Companies is the principal national trade association for bank holding companies in the United States; and the Association of Reserve City Bankers ("ARCB") is an association of the highest ranking officers of the major U.S. banking institutions. The ARCB monitors, identifies and analyzes issues relating to the economy and the financial system that will affect the business of banking. The ARCB sponsors research and analysis of issues of importance to banking and the nation's payment system.

The period of the late 1980's and early 1990's has been one of great and rapid change in the financial services industry. Increasing and differing forms of competition nationally and internationally, a new legal and regulatory environment, technology, and general economic conditions have collectively altered and continue to alter the shape of the banking industry. As bankers struggle to cope with future shock, questions as to how banks, bankers and bank holding companies may—or must—conduct such common transactions as mergers, acquisitions and buyouts assume an immense practical importance to the membership of the sponsoring organizations. There are serious issues raised by the "questions presented" upon which this Court has granted certiorari that pertain to the American corporate world generally. Those issues are fully discussed in the Brief of the Petitioner.

Your amici respectfully request the opportunity to supplement the Petitioner's analysis by describing the distinct nature of the highly regulated banking in-

dustry and the separate legislative and administrative regime under which that industry operates.

Respectfully submitted,

RICHARD M. WHITING
ASSOCIATION OF BANK
HOLDING COMPANIES
730 15th Street, N.W.
Suite 820
Washington, D.C. 20005
(202) 393-1158

JOHN J. GILL III
Counsel of Record
MICHAEL F. CROTTY
AMERICAN BANKERS ASSOCIATION
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 663-5026

CHARLES L. MARINACCIO
STEPHEN V. R. WHITMAN
KELLEY, DRYE & WARREN
2300 M Street, N.W.
Washington, D.C. 20036
(202) 955-9600

Counsel For Amici Curiae

June 25, 1990

QUESTIONS PRESENTED

1. Whether Section 14(a) of the Securities Exchange Act of 1934 requires proxy statements not only to disclose material facts, but also to disclose alleged ulterior motivations of corporate directors and to characterize disclosed facts in a pejorative manner.

2. Whether a plaintiff may invoke an implied cause of action for damages under Section 14(a) of the Securities Exchange Act of 1934 when the allegedly misleading proxy statement could not possibly have affected the outcome of the proxy vote, and the plaintiff has not demonstrated causation in any other way. This is a question that the Court explicitly left open in *Mills v. Electric Auto-Life Co.*, 396 U.S. 375, 385 n.7 (1970).

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
INTEREST OF THE AMICI CURIAE	1
SUMMARY OF THE ARGUMENT	3
ARGUMENT	4
CONCLUSION	14

TABLE OF AUTHORITIES

	Page
CASES:	
American Bankers Association v. Securities and Exchange Commission, 804 F.2d 739 (1986)	6
Board of Governors v. First Lincolnwood Corporation, 439 U.S. 234 (1978)	12
Cort v. Ash, 422 U.S. 66 (1975)	12,13
Cannon v. University of Chicago, 441 U.S. 677 (1979)	12
Carlson v. Green, 446 U.S. 14 (1980)	12
J. I. Case Co. v. Borak, 377 U.S. 426 (1964)	*passim*
First National Bank of Bellaire v. Comptroller of the Currency, 697 F.2d 674 (5th Cir. 1983)	9
Gulf Federal Savings & Loan v. FHLBB, 651 F.2d 259 (5th Cir. 1981), *cert. denied*, 458 U.S. 1121 (1982)	9
Marx v. Centran Corp., 474 F.2d 1536 (6th Cir. 1984), *cert. denied*, 471 U.S. 1125 (1985)	11
Massachusetts Mutual Life Insurance Co. v. Russell, 473 U.S. 134 (1985)	11
Piper v. Chris-Craft Industries, Inc., 430 U.S. 1 (1977)	13
Thompson v. Thompson, 484 U.S. 174 (1988)	12
Touche Ross & Co. v. Redington, 442 U.S. 560 (1979)	12
United States v. FMC Corp., 717 F.2d 775 (3d Cir. 1983)	11
Universities Research Association v. Coutu, 450 U.S. 754 (1981)	11,12
STATUTES AND REGULATIONS:	
12 U.S.C. § 1818	8
12 U.S.C. § 1828(c)	10
15 U.S.C. § 77c(a)(2)	6
15 U.S.C. § 77(q)(c)	5

Table of Authorities Continued

	Page
15 U.S.C. § 78c(a)(4) and (5)	6
15 U.S.C. § 78n(a)	2,4,7
15 U.S.C. §§ 80a-2(a)(6), (11)	6
15 U.S.C. §§ 80a-3(c)(3), (11)	6
15 U.S.C. §§ 80b-2(a)(3), (7), (11)	6
Banking Act of 1933, ch. 89, §§ 19-30, 48 Stat. 188-192	8
LEGISLATIVE MATERIAL:	
Hearings on S. 1642 before a Subcomm. of the Senate Comm. on Banking and Currency, 88th Cong., 1st Sess. 175-176 (1963)	6,7
77 Cong. Rec. 2939 (1933) (Statement of Congressman Mapes)	6
112 Cong. Rec. 23,998 (1966) (Statement of Cong. Patman)	9
First National Bancshares Newton Inc., 66 Fed. Res. Bull. 777 (1980)	10
New Mexico Banquest Investors Corporation, 69 Fed. Res. Bull. 877, fn. 5 (1983)	10
S. Rep. No. 379, 88th Cong., 1st Sess. 31 (1963)	8
MISCELLANEOUS:	
Mathewson, *From Confidential Supervision to Market Discipline: The Rule of Disclosure in the Regulation of Commercial Banks*, 22 Journal of Corp. Law 139 (1986)	10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1448

VIRGINIA BANKSHARES, INC., *et al.*,
Petitioners,

v.

DORIS I. SANDBERG, *et al.*,
Respondents.

FIRST AMERICAN BANKSHARES, INC., *et al.*,
Petitioners,

v.

PAUL H. WEINSTEIN, *et al.*,
Respondents.

BRIEF OF THE AMERICAN BANKERS ASSOCIATION, THE ASSOCIATION OF BANK HOLDING COMPANIES, AND ASSOCIATION OF RESERVE CITY BANKERS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICI CURIAE

The American Bankers Association, the Association of Bank Holding Companies, and the Association of Reserve City Bankers with leave of the Court hereby respectfully submit this Brief as Amici Curiae in order to urge the Court to reverse the decision of the United

States Court of Appeals for the Fourth Circuit below. The court, in that decision, affirmed district court money judgments in favor of minority shareholders who were dissatisfied with the valuation of the shares they owned in a bank when those shares were bought out in a merger transaction. The minority shareholders, Respondents here, had filed suit claiming that the proxy statements issued in connection with the proposed buyout were misleading and incomplete in several respects, in violation of Section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78n(a). The Brief of the Petitioners in this case discusses at length the important federal securities law issues raised by the Fourth Circuit's decision. Your amici support the arguments advanced by the Petitioners, but have a somewhat different perspective which should not be overlooked as the Court considers this case.

As set forth in the preceding motion, the sponsoring organizations are principal national trade associations of the commercial banking industry in the United States. The American Bankers Association has, as its membership, commercial banks themselves, representing banks holding approximately ninety-five percent of domestic assets of all American banks. The Association of Bank Holding Companies has, as its members, holding companies which own or control commercial banks, and its member holding companies represent an estimated seventy percent of domestic assets of the commercial banking industry. The Association of Reserve City Bankers has, as its members, the highest ranking officers of the major U.S. banking institutions. The interests of all three are implicated in this case, since bank holding companies

and bank directors were all defendants in the case below and the transaction in issue involved the stock of a bank.

This latter fact is of critical importance here. This is not a case in which the nature of the subject corporation is an irrelevant consideration in determining the meaning and effect of a generally applicable law. Banks are regulated in a manner different from other businesses in a great many respects, and the laws which create the separate regulatory regime are enacted for public policy reasons different from (though not necessarily inconsistent with) the public policy reasons which lead to the enactment of otherwise generally applicable laws.

Your amici have distinct interest in seeing that this case is not decided here, as it was in the Fourth Circuit, with no appreciation of the special nature of banks or of the consequences which flow from that special nature.

SUMMARY OF THE ARGUMENT

In 1964, this Court concluded that there was, under certain circumstances, an implied private right of action for damages under Section 14(a) of the Securities Exchange Act of 1934. *J. I. Case Co. v. Borak*, 377 U.S. 426 (1964). Subsequent decisions of the Court have cast considerable doubt upon the continuing validity of *Borak*. Whether it is still valid or not, it is important to note that Congress amended the 1934 Act almost simultaneously with the decision in Borak. The amendment carved out an exception to the administration and enforcement of Section 14(a), vesting it in the hands of the federal bank regulatory agencies instead of the Securities and Exchange Com-

mission. Two years later, Congress strengthened the general ability and power of the bank regulatory agencies to enforce laws, regulations and safety and soundness standards against commercial banks through a detailed administrative process. Generally speaking, the federal judiciary is sometimes willing to find an "implied" private right of action where to do so would, in some fashion, further the obvious goals of the statute. It becomes increasingly difficult to find "implied" rights where private enforcement is not necessary to effectuate statutory goals and is, in fact, counterproductive of them. The goal of "investor protection" which motivated the enactment of the proxy solicitation statute may or may not be served by an implied private right of action to supplement Securities and Exchange Commission enforcement and administration of the law. But it is clear that Congress had a different and additional goal in mind—the goal of safety and soundness of insured depository institutions—when it gave bank regulatory authorities rather than the SEC jurisdiction over bank proxy statements. That latter goal is not furthered by an implied private right of action.

ARGUMENT

This is a class action lawsuit for damages by disappointed minority stockholders of a bank filed under Section 14(a) of the Securities Exchange Act of 1934. 15 U.S.C. 78n(a). Section 14(a) says nothing about whether stockholders or anyone else may sue for damages where it is alleged that the proxy rules promulgated under the authority of this section have been violated. Indeed, the Securities and Exchange Commission has general enforcement authority with re-

spect to its proxy rules. Nevertheless, this Court has held, in *J. I. Case Co. v. Borak*, 377 U.S. 426 (1964), that there was an "implied" private right of action under Section 14(a). The Court acknowledged that the statute "makes no specific reference to a private right of action" (*Id.* at 432) but pointed out that the statutory language itself set forth that "among its chief purposes is 'the protection of investors', which certainly implies the availability of judicial relief where necessary to achieve that result." (*Id.*, quoting Section 14(a)). The Court went on to say that "[p]rivate enforcement of the proxy rules provides a necessary supplement to Commission action." *Id.*

The *J. I. Case Co.* litigation involved a stockholder challenge to the merger of an ordinary Wisconsin business corporation with a tractor company. The *Virginia Bankshares* litigation now before the Court does not involve tractor companies; it involves banks. Because bank stock and the special regulatory considerations which pertain to banks are involved here, the *J. I. Case Co.* precedent should not apply.

Two months after the *J. I. Case Co.* decision was handed down, Congress enacted Section 12(i) of the Securities & Exchange Act, vesting the regulation of various bank securities matters in the hands of the appropriate federal banking regulatory agencies rather than the Securities and Exchange Commission. The change was part of a consistent pattern of exempting banks from the full import of the securities laws.[1]

---

[1] When Congress has intended that certain aspects of the securities laws should apply to banks, it said so explicitly. *See, e.g.*, § 17c of the 1933 Act. 15 U.S.C. § 77q(c) making inapplicable for one purpose an exemption to which banks are otherwise entitled.

Section 3 of the Securities Act of 1933 provides that the Act does not apply (with limited exceptions) to "any security issued or guaranteed by any bank" 15 U.S.C. 77c(a)(2). It was not necessary for the Securities laws to apply to banks because they "are already under the control of Federal and state authorities" 77 Cong. Rec. 2939 (1933) (Statement of Congressman Mapes). Section 3 of the Securities Exchange Act of 1934 provides that banks are exempt from the various requirements the law makes applicable to brokers and dealers. 15 U.S.C. 78c(a)(4) and (5). *See also American Bankers Association v. Securities and Exchange Commission*, 804 F.2d 739 (1986). There are exemptions for banks from various provisions of the Investment Company Act of 1940, 15 U.S.C. 80a-2(a)(6), (11), 80a-3(c)(3), (11), and from the Investment Advisers Act of 1940, 15 U.S.C. 80b-2(a)(3), (7), (11).

Section 12(i), as enacted in 1964, was more than a cosmetic change or one merely allocating "turf" among federal agencies. It was enacted because Congress recognized and ratified the historic practice of enforcing laws relative to banks differently than with respect to other corporations. In Congressional hearings on the bill, the Comptroller of the Currency warned that disclosure obligations must be carefully formulated by bank regulators to avoid compromising the safety and soundness of banks. *Hearings on S. 1642 before a Subcomm. of the Senate Comm. on Banking and Currency*, 88th Cong., 1st Sess. 175-176 (1963). The Comptroller expressed particular concern over unconstrained private rights of action under proxy regulations applicable to banks, which regulators had disapproved in prior years (*id.* at 176-177):

> For this same reason it was decided not to rely upon private actions brought by shareholders for enforcement of our regulation. This is a concept which is foreign to bank regulation. We believe that it is clearly more effective and preferable for law enforcement to be accomplished directly by the responsible regulatory agency, rather than through private lawsuits with their uncertain effectiveness and their attendant risk of abuses, such as strike and nuisance actions.

The Federal Deposit Insurance Corporation likewise emphasized the need for special caution in regulating bank proxy solicitations, warning that "depositors' funds could be jeopardized by unlimited disclosure requirements . . . [T]herefore, the corporation has a major interest in assuring that disclosure requirements are consistent with the maintenance of depositors' confidence and the integrity of the deposit insurance fund." *Id.* at 225, 227. If legislation were enacted, the FDIC recommended, "the statute itself should specifically place the powers, functions and duties with respect to public disclosures in connection with bank securities issuers in the appropriate Federal banking supervisory authority, rather than in the Securities and Exchange Commission." *Id.* at 228.

Based on the concerns expressed by the Comptroller of the Currency and the FDIC, the law Congress enacted provides that the federal bank regulatory agencies shall have the "powers, functions and duties vested in the Commission to administer and enforce" Section 14(a) (among others) of the Securities Exchange Act, 15 U.S.C. § 78n(a), as it applies to proxy solicitations of federally regulated and insured banks. In conferring jurisdiction on the bank

regulators rather than the SEC, Congress sought to assure "full coordination with the safeguards provided by the Federal bank regulatory structure." S. Rep. No. 379, 88th Cong., 1st Sess. 31 (1963). It explained that disclosure laws must confer "great discretionary authority [upon] the administering agency to make appropriate rules, classifications, and exceptions. Under these provisions, the Federal bank regulatory agencies could adopt rules and forms different from those of the Commission." *Id.* at 36. Like the Comptroller of the Currency, Congress also expressed the belief that enforcement of the proxy rules must proceed with great caution. In particular, while the SEC had frequently resorted to litigation to deal with perceived infractions of its rules, Congress directed the banking agencies to proceed in a manner consistent with traditional supervisory policies: "it is likely that the relationship between the Federal bank regulatory agencies and the banks under their jurisdiction is such that it will rarely, if ever, be necessary for these agencies to resort to these remedies." *Ibid.*

The traditional supervisory policies had, since the Banking Act of 1933, included a high degree of administrative (i.e., non-judicial) enforcement. *See, e.g.*, Banking Act of 1933, ch. 89, 19-30, 48 Stat. 188-192. In 1966, the administrative enforcement powers of the banking regulatory agencies were increased considerably by enactment of the Financial Institutions Supervisory Act, 12 U.S.C. § 1818. It authorizes the agencies to serve a notice of changes upon a bank in the event that the bank is engaging or is about to engage in an unsafe or unsound practice or is violating or about to violate any law, rule or regulation. The agency may then conduct a cease and desist pro-

ceeding and, if appropriate, issue a cease and desist order. There are also provisions in the Act for temporary cease and desist orders, and for suspension and removal of bank officers, directors or employees. The law provides that cease and desist orders may compel affirmative action to correct conditions resulting from the unsafe and unsound practices or violations; any orders issued under the law are subject to judicial review, and are backed up by civil money penalties for violation of any such orders.

The manifest object of the 1966 Act was to preserve the safety and soundness of insured institutions. *Gulf Federal Savings & Loan v. FHLBB*, 651 F.2d 259, 262-264 (5th Cir. 1981), *cert. denied*, 458 U.S. 1121 (1982).

> A Cease and Desist Order may be issued in two types of situations: when a bank is, has, or is about to engage in an unsafe or unsound practice or when a bank is, has, or is about to violate a law, rule, or regulation. . . . [B]oth situations are limited to practices with a reasonably direct effect on a bank's financial stability

First National Bank of Bellaire v. Comptroller of the Currency, 697 F.2d 674, 681 (5th Cir. 1983).

> Of course, it should be clear to all that the cease and desist powers and management removal powers are aimed specifically at actions impairing the safety or soundness of our insured financial institutions. These new flexible tools relate strictly to the insurance risk and to assure the public of sound banking facilities.

112 Cong. Rec. 23,998 (1966) (Statement of Cong. Patman).

The federal bank regulatory agencies have used their administrative powers to deal with precisely the same kind of transactions at issue in this case. This merger was subject to the review and prior approval of the FDIC under the Bank Merger Act, 12 U.S.C. § 1828(c). That Act specifically requires that the appropriate federal bank regulator take into consideration, among other things, the "managerial resources" of the existing and proposed institution. This provision often has been utilized by the bank regulatory agencies as a vehicle to assess the fairness of treatment of minority shareholders. *New Mexico Banquest Investors Corporation*, 69 Fed. Res. Bull. 877, fn. 5 (1983) and *First National Bancshares Newton Inc.*, 66 Fed. Res. Bull. 777, 778 (1980), (applying identical language in the Bank Holding Company Act.). Such federal bank regulatory provisions, therefore, provide for consideration of allegations such as those at issue here consistent with the existing bank regulatory scheme. As stated, this scheme establishes a system to address allegations of unfairness or misrepresentation in a process consistent with "the maintenance of a sound banking system and the prevention of failures. It is universally recognized that public confidence in the banking system is absolutely essential to achieve these ends."[2]

In sum, then, the federal bank regulatory agencies have the explicit statutory jurisdiction to promulgate and administer proxy rules pertaining to bank stocks; they have and use a more than adequate mechanism for the enforcement of those rules; and it was in-

[2] Mathewson, *From Confidential Supervision to Market Discipline: The Rule of Disclosure in the Regulation of Commercial Banks*, 22 Journal of Corp. Law 139, 158 (1986).

tended that in the administration and enforcement of those rules the agencies would take into account important public policy concerns other than and in addition to the public policy concerns applicable to other corporate stock transactions. Such "carefully integrated civil enforcement provisions . . . provide strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly." *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134, 146 (1985).

This is not, therefore, a case like *J. I. Case Co.* where a "supplement" to Commission action is necessary. Indeed, courts have refused to imply private rights of action in cases like this one where private enforcement would be "disruptive of the legislative scheme considered as a whole."[3] Refusal to do so is especially warranted in the case of a complex regulatory scheme under which comprehensive remedial powers have been entrusted to expert agencies: "Implied rights of action may alter the remedial scheme devised by Congress for the enforcement of statutory programs and thus place the judiciary in the role of enunciating or modifying policy decisions properly the preserve of the legislature."[4] Judicial creation of a private right of action in such circumstances introduces new uncertainty into the regulatory scheme, undercuts the interest in consistent application of federal law, and increases the risk that the courts will substitute their judgment for that of the agency. *See*

[3] *Marx v. Centran Corp.*, 747 F.2d 1536, 1549-50 (6th Cir. 1984), *cert. denied*, 471 U.S. 1125 (1985) (Bank Holding Company Act).

[4] *United States v. FMC Corp.*, 717 F.2d 775, 780 (3d Cir. 1983).

Universities Research Association v. Coutu, 450 U.S. 754, 782-84 (1981).

This is an especially critical consideration in this case, since the open-ended nature of the liability to which the Fourth Circuit's decision exposes banks threatens the dissipation of bank capital the adequacy of which, this Court has recognized, forms the bulwark of bank safety. *Board of Governors v. First Lincolnwood Corporation*, 439 U.S. 234, 250 (1978).

J. I. Case Co. stands for the proposition that there is an implied private right of action for damages under Section 14(a) of the Securities Exchange Act. Even under its own facts, it is probable that it is no longer good law.[5] Insofar as it may be said to set forth any general principles for the analysis of when a private right should be implied and when not, it has clearly been superseded by this Court's decision

---

[5] *See, e.g., Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979): ("To the extent that our analysis in today's decision differs from that of the Court in *Borak*, it suffices to say that in a series of cases since *Borak* we have adhered to a stricter standard for the implication of private causes of action, and we follow that stricter standard today."); *Carlson v. Green*, 446 U.S. 14, 39-40 n.5 (1980) (Rehnquist, J., dissenting) ("In light of this Court's recent decisions . . . it is clear that there is nothing left of the rationale of *Borak*"); *Cannon v. University of Chicago*, 441 U.S. 677, 735-36 (1979) (Powell, J., dissenting) ("I find [*Borak*] both unprecedented and incomprehensible as a matter of public policy. . . . [I]t constitutes a singular and, I believe, aberrant interpretation of a federal regulatory statute"); *Thompson v. Thompson*, 484 U.S. 174, 190 (1988) (Scalia, J., concurring in the judgment) ("This Court has long since abandoned its hospitable attitude towards implied rights of action. In the 23 years since . . . [*Borak*] we have twice narrowed the test for implying a private right"); *id.* at 188 (O'Connor, J., concurring) (same).

in *Cort v. Ash*, 422 U.S. 66, 78 (1975) in which a four-factor test was set forth.

(1) Is the plaintiff one of a class for whose especial benefit the statute was enacted? For the reasons set forth above, the answer in this case is clearly a negative. The plaintiffs here were owners of bank stock, and bank stock was explicitly carved out of the general applicability of Section 14(a) of the Act in 1964.

(2) Is there any indication of legislative intent to create or deny such a remedy? For the reasons set forth above, the answer in this case is clearly that the legislative intent was to deny such a remedy, simply by virtue of the creation of a comprehensive alternative means of enforcement of the law pertaining to bank stock.

(3) Is it consistent with the underlying purposes of the legislative scheme to imply such a remedy? For the reasons set forth above, the answer in this case is clearly negative. The regulation of the nation's banks has been vested in expert regulatory agencies which, in turn, have been directed time and again to assure the safety and soundness of the institutions which deal in other people's money. Private plaintiffs and federal juries lack the expertise and the "safety and soundness" obligations necessary to carry out that Congressional goal. Where a private right of action is unnecessary or detrimental to the achievement of statutory goals, it will not be implied. *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 39-40 and n. 26 (1977).

(4) Is the cause of action traditionally relegated to state law? The answer in this case is clearly affirmative, and in fact the plaintiffs here sought a state

law remedy for their complaints—and lost—prior to filing this federal action. See Pet. for Writ of Cert. at 5-6.

CONCLUSION

This Court's 1964 decision in *J. I. Case Co. v. Borak* does not, standing alone, dictate that there is a private right of action for damages in cases involving proxy statements surrounding a *bank* merger, even if *J. I. Case Co.* is still good law. Banks and bank stocks are treated differently other corporations and corporate stocks. Since the Fourth Circuit failed to recognize and respect that difference, its decision should be reversed by this Court.

Respectfully submitted,

RICHARD M. WHITING
ASSOCIATION OF BANK
HOLDING COMPANIES
730 15th Street, N.W.
Suite 820
Washington, D.C. 20005
(202) 393-1158

JOHN J. GILL III
Counsel of Record
MICHAEL F. CROTTY
AMERICAN BANKERS ASSOCIATION
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 663-5026

CHARLES L. MARINACCIO
STEPHEN V. R. WHITMAN
KELLEY, DRYE & WARREN
2300 M Street, N.W.
Washington, D.C. 20036
(202) 955-9600

Counsel For Amici Curiae

June 25, 1990

Supreme Court, U.S.
FILED
JUN 25 1990
JOSEPH F. SPANIOL, JR.
CLERK

(12)

No. 89-1448

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1989

VIRGINIA BANKSHARES, INC., et al.,
Petitioners,

v.

DORIS I. SANDBERG, et al.,
Respondents.

FIRST AMERICAN BANKSHARES, INC., et al.,
Petitioners,

v.

PAUL H. WEINSTEIN, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

~~MOTION FOR LEAVE TO FILE BRIEF AND~~ BRIEF OF THE NATIONAL ASSOCIATION OF SECURITIES AND COMMERCIAL LAW ATTORNEYS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

DAVID B. GOLD
(Counsel of Record)
JOHN W. ALLURED
DAVID B. GOLD,
A Professional Law Corporation
595 Market Street, Suite 2300
San Francisco, CA 94105
(415) 77-2230

JONATHAN W. CUNEO
(NASCAT General Counsel)
Law Offices of
JONATHAN W. CUNEO
1300 Eye Street, N.W.
East Tower, Suite 480
Washington, D.C. 20005
(202) 962-3860
Counsel for Amicus Curiae

BOWNE OF SAN FRANCISCO, INC. • 180 NINTH ST. • S.F., CA 94103 • (415) 864-2300

13

No. 89-1448

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1989

VIRGINIA BANKSHARES, INC., et al.,
Petitioners,

v.

DORIS I. SANDBERG, et al.,
Respondents.

FIRST AMERICAN BANKSHARES, INC., et al.,
Petitioners,

v.

PAUL H. WEINSTEIN, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Pursuant to Rule 37.3 of the Rules of this Court, the National Association of Securities and Commercial Law Attorneys ("NASCAT") respectfully moves for leave to file the enclosed brief as amicus curiae in support of respondents. Counsel for respondents has granted consent to file this brief. Counsel for petitioners also has granted consent to file this brief.

NASCAT is an association of law firms consisting of approximately 500 attorneys located throughout the United States whose purpose is to promote the enactment and enforcement of legislation which protects investors from deceptive and manipulative practices and ensures that the securities markets in the United States can operate in a fair and free manner. NASCAT members

have represented plaintiffs in a variety of individual and class action contexts under the federal securities laws; some NASCAT members have also represented defendants in securities and other cases.

NASCAT and its members have a strong interest in the effective private enforcement of the federal securities laws and in the development of case law that effectively deters would-be wrongdoers from perpetrating securities fraud upon public investors. Especially in light of increased level of merger activity, leveraged buy-outs, and other forms of corporate reorganization in recent years, the issues raised by this appeal are extremely important to the investment community and the capital markets generally.

The enclosed amicus curiae brief addresses the viability of a claim under Section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C § 78n(a), for damages resulting from a materially misleading proxy solicitation in a "freeze-out" situation, i.e., where management owns sufficient shares to consummate the proposed transaction without approval of the minority shareholders. More specifically, the brief addresses the question whether minority shareholders in such a situation can prove that a deceptive proxy solicitation caused them damage.

Respectfully submitted,

DAVID B. GOLD
(Counsel of Record)
JOHN W. ALLURED
DAVID B. GOLD,
A Professional Law Corporation
595 Market Street, Suite 2300
San Francisco, CA 94105
(415) 777-2230

JONATHAN W. CUNEO
(NASCAT General Counsel)
LAW OFFICES OF JONATHAN W. CUNEO
1300 Eye Street, N.W.
East Tower, Suite 480
Washington, D.C. 20005
(202) 962-3860
Counsel for Amicus Curiae

TABLE OF CONTENTS

	Page
Table Of Authorities	ii
Interest Of The Amicus Curiae	1
Summary Of The Argument	2
Argument	2
Conclusion	8

TABLE OF AUTHORITIES

Cases

	Page
Basic Inc. v. Levinson, 485 U.S. 224 (1988)	4, 7
Cole v. Schenley Industries, Inc., 563 F.2d 35 (2nd Cir. 1977)	3, 4
Herman & MacLean v. Huddleston, 459 U.S. 375 (1983)	4
Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970)	*passim*
Schlick v. Penn-Dixie Cement Corp., 507 F.2d 374 (2nd Cir. 1974), cert. denied, 421 U.S. 976 (1975)	3, 4, 5
SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180 (1963)	4
Swanson v. American Consumer Industries, Inc., 415 F.2d 1326 (7th Cir. 1969)	4
Valente v. Pepsico, 454 F.Supp. 1228 (D. Del. 1978)	3

Statutes and Regulations

15 U.S.C. § 78n(a)	*passim*

Miscellaneous

Note, *Causation and Liability in Private Actions for Proxy Violations*, 80 Yale L.J. 107(1970)	*passim*
Eisenberg, *Modern Corporate Decisionmaking*, 57 Cal. L. Rev. 1 (1969)	5

No. 89-1448

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1989

VIRGINIA BANKSHARES, INC., et al.,
Petitioners,

v.

DORIS I. SANDBERG, et al.,
Respondents.

FIRST AMERICAN BANKSHARES, INC., et al.,
Petitioners,

v.

PAUL H. WEINSTEIN, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF SECURITIES AND COMMERCIAL LAW ATTORNEYS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICUS CURIAE

As explained in the foregoing motion for leave to participate as amicus curiae, NASCAT is a national association of law firms consisting of approximately 500 attorneys located throughout the United States whose purpose is to facilitate protection of investors

and other consumers through appropriate legislative and judicial activity.

One of the issues in this case, i.e., the extent to which minority shareholders can pursue claims under Section 14(a) of the Securities Exchange Act of 1934 in a "freeze-out" situation, is extremely important. Largely as a result of innovative financing techniques and sheer economic growth, the level of mergers, leveraged buy-outs and other corporate restructurings have increased dramatically. As such, the issues presented in this case are extremely important to the investment community and the capital markets generally.

SUMMARY OF THE ARGUMENT

In situations where minority shareholders lack sufficient votes to prevent a proposed corporate transaction, minority shareholders can establish causation for purposes of a claim under Section 14(a). Moreover, causation may be established by proof that the proxy solicitation was materially misleading and was an "essential link" in the transaction.*

ARGUMENT

I.

MINORITY SHAREHOLDERS MAY RECOVER FOR VIOLATIONS OF SECTION 14(a) EVEN WHEN THEY LACK SUFFICIENT VOTING STRENGTH TO BLOCK THE TRANSACTION TO WHICH THE DEFECTIVE PROXY SOLICITATION RELATES

In *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970), this Court reserved the question whether causation in a private action under Section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(a), can be demonstrated when management controls a sufficient number of shares to approve the transaction as to which proxies are solicited without any votes from the minority.

* NASCAT does not address the issue concerning the actionability of representations about the reasons or purposes for corporate transactions.

Id. at 385 n.7. Since that decision, several courts, as well as scholarly commentators, have concluded that defendants can be held responsible for deceptive proxy solicitations even when the minority voting strength is insufficient to block the transaction. *See, e.g., Cole v. Schenley Industries, Inc.*, 563 F.2d 35, 39-40 (2nd Cir. 1977); *Schlick v. Penn-Dixie Cement Corp.*, 507 F.2d 374, 383-384 (2nd Cir. 1974), *cert. denied*, 421 U.S. 976 (1975); *Valente v. Pepsico*, 454 F.Supp. 1228, 1248-49 (D. Del. 1978). *See also* Note, *Causation and Liability in Private Actions for Proxy Violations*, 80 Yale L.J. 107 (1970). NASCAT respectfully submits that this view is correct.[1]

The Securities and Exchange Commission ("SEC") and the Federal Deposit Insurance Corporation ("FDIC"), as amici curiae, persuasively argue that a deceptive proxy solicitation may cause injury to minority shareholders in several ways. First, the shareholders may be induced to vote in favor of a transaction, thereby precluding appraisal remedies. *See* Brief for the Securities and Exchange Commission and the Federal Deposit Insurance Corporation as Amici Curiae ("SEC Brief") at 24-25.[2] Second, a minority shareholder may refrain from pursuing injunctive relief or may fail to obtain such relief, even if he pursues it. *Id.* at 25. Third, the proponents of the transaction may be unwilling to proceed with the proposed transaction if truthful disclosure were required, such as in situations where the exercise of appraisal remedies by all minority shareholders would be deemed prohibitive by management. *Id.* at 26.[3] *See also Schlick v. Penn-Dixie*

[1] In addressing these issues, NASCAT does not concede that petitioners have preserved their claims for review by this Court.

[2] A misleading proxy solicitation may dissuade a minority shareholder from pursuing appraisal rights even where the minority shareholder does not vote on the transaction or where he votes against it. Regardless of how the minority shareholder votes—or whether he votes at all—the deceptive proxy solicitation may discourage him from pursuing appraisal rights.

[3] Indeed, it is possible to conceive of a situation where, regardless of the proponents' subjective state of mind, the assets of the corporation may be insufficient to satisfy appraisal rights pursued by the minority

Cement Corp., 507 F.2d at 384 (proponents of transaction may be dissuaded from pursuing transaction if proxy solicitation would entail public disclosure of unfavorable information). Such examples clearly demonstrate that minority shareholders must be permitted to seek redress under Section 14(a) even in situations where management owns sufficient shares to consummate the proposed transaction.

Recognition of the right to redress in such situations is fully consistent with policies underlying the federal securities laws. That the Securities Exchange Act of 1934 was designed to implement a policy of "full disclosure" has been repeatedly recognized by this Court. *E.g., Basic Inc. v. Levinson*, 485 U.S. 224, 230 (1988). Moreover, the Court has consistently held that the federal securities laws should be construed "not technically and restrictively, but flexibly to effectuate [their] remedial purposes." *Herman & MacLean v. Huddleston*, 459 U.S. 375, 386-387 (1983) (quoting *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 195 (1963)). Yet if this Court were to preclude claims under Section 14(a) by minority shareholders—regardless of how outrageous the fraud—it "would 'sanction all manner of fraud and overreaching. . .'." *Schlick v. Penn-Dixie Cement Corp.*, 507 F.2d at 383 (quoting *Swanson v. American Consumer Industries, Inc.*, 415 F.2d 1326, 1331 (7th Cir. 1969). This cannot be.

Recognition of the ability of minority shareholders to prove causation in a "freeze-out" situation—thereby enabling them to bring claims under Section 14(a)—will not only protect minority shareholders; it will also promote the integrity of the trading markets. Because publicly-disseminated information is absorbed in securities prices (*see Basic Inc. v. Levinson*, 485 U.S. at 246-247), the effects of a misleading proxy solicitation are not confined to the pre-existing shareholders of the corporation, but also affect those who trade—or even consider trading—the corporation's securities. As the Second Circuit has recognized, "[b]y disclosure the *market* will be informed, so as to permit well-based

---

shareholders *en masse*. *See Cole v. Schenley Industries, Inc.*, 563 F.2d at 39-40. *See also* Note, *supra*, 80 Yale L.J. at 127-128.

decisions about buying, selling and holding the securities involved in the transaction. [citation]." *Schlick v. Penn-Dixie Cement Corp.*, 507 F.2d at 384 (emphasis in original).

In sum, acceptance of petitioners' argument would encourage the precise sort of fraud that the Securities Exchange Act was designed to prohibit. Especially at a time when public confidence in the capital markets and financial institutions has been severely tested by public revelations of insider trading, the downfall of venerable Wall Street firms and the collapse of the savings and loan industry, it is important that this Court insist on truthfulness by those in positions of corporate responsibility.[4]

II.

"CAUSATION" MAY BE ESTABLISHED BY PROOF THAT THERE WAS A MATERIAL MISREPRESENTATION AND/OR OMISSION AND THAT THE PROXY SOLICITATION WAS AN ESSENTIAL LINK IN THE TRANSACTION

NASCAT submits that causation may be established in a "freeze-out" situation upon proof that the proxy solicitation contained a material misrepresentation and/or omission and was an essential link in the transaction. Furthermore, NASCAT submits that the approach urged by petitioners, i.e., that plaintiffs must prove that they would have succeeded in preventing the transaction if they had been advised of the truth, is erroneous.

In *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970), this Court stated:

> Where there has been a finding of materiality, a shareholder has made a sufficient showing of causal relationship between

---

[4] The fact that, in some cases, minority shareholders might have statutory appraisal rights does not vitiate the need to recognize claims by minority shareholders under Section 14(a). Appraisal remedies are cumbersome (*e.g.*, Eisenberg, *Modern Corporate Decisionmaking*, 57 Cal. L. Rev. 1, 85 (1969)) and may not permit redress on a class-wide basis. Thus, the possibility of appraisal remedies will not itself provide an effective deterrent to fraud.

> the violation and the injury for which he seeks redress if, as here, he proves the proxy solicitation itself, rather than the particular defect in the solicitation materials, was an essential link in the accomplishment of the transaction.

Id. at 385.

Any suggestion that the "essential link" concept cannot apply in a "freeze-out" situation is false; indeed, a materially misleading proxy solicitation may be necessary in a variety of ways. In a "freeze-out" situation, the materially misleading proxy solicitation may be an "essential link" in that, *inter alia*, it (1) conceals a material fraud which, if disclosed, would result in an injunction against the proposed transaction, (2) dissuades or precludes shareholders from pursuing appraisal rights, (3) enables management to avoid adverse publicity which might effectively preclude the transaction, or (4) is necessary for legal or practical reasons. *See generally* Note, *supra*, 80 Yale L.J. at 123.

Indeed, it is entirely reasonable to suppose that a majority shareholder would not disseminate a materially misleading proxy solicitation unless he perceives that full and fair disclosure would cause results which are disadvantageous or prohibitive. In a situation where he controls enough votes to approve the transaction—and therefore does not need to induce persons to vote in favor of it—what other reason does he have to lie?

Although petitioners assert that a minority shareholder must prove that he would have prevented the transaction had the true facts been disclosed (Brief for Petitioners at 47), this is erroneous. First, petitioners' approach requires proof which is essentially hypothetical. Second, petitioners' approach may deprive minority shareholders of the right to recover, even though they may have been directly injured as a result of the misleading proxy solicitation. Third, petitioners' approach serves no valid purpose in a "freeze-out" situation. Thus, petitioners' approach should be rejected.

This Court has previously rejected the requirement that plaintiffs prove matters which are hypothetical. For example, in *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970), the Court refused to require plaintiff in an ordinary voting situation to show how the

voting would have been different had the truth been told. *Id.* at 384-385. Also, in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), the Court declined to require that open market purchasers of securities prove how they would have acted had the truth been told. *Id.* at 230. There, the Court stated,

> Requiring a plaintiff to show a speculative state of facts, i.e., how he would have acted if omitted material information had been disclosed . . . or if the misrepresentation had not been made . . . would place an unnecessarily unrealistic evidentiary burden on the Rule 10b-5 plaintiff who has traded on an impersonal market.

Id. (citations omitted).

Here, petitioners seek to impose the same type of burden, i.e., proving a hypothetical, on minority shareholders. However, there is no reason to do so.

In addition, petitioners disregard the fact that minority shareholders may be injured as a direct consequence of the alleged fraud, even if they cannot actually stop the transaction. For example, in some situations minority shareholders will have appraisal rights; a shareholder who is fraudulently induced to forego appraisal rights by virtue of a misleading proxy solicitation is clearly injured as a direct consequence of defendants' wrongdoing, even if he cannot prove that he would have been able to actually stop the transaction. *See* Note, *supra*, 80 Yale L.J. at 128-129. It is therefore unnecessary to require proof that the transaction would have been stopped.

Finally, the test suggested by petitioners improperly permits the possibility that a claim under Section 14(a) will be denied for reasons wholly unrelated to the merits of plaintiffs' allegations. For example, a plaintiff may be required to post a bond in order to obtain injunctive relief; under petitioners' theory, evidence that an aggrieved shareholder would not be able to post a bond presumably would preclude proof of causation, even though such a result is clearly anomalous. Similarly, if defendants can show that injunctive relief would have been denied by the state court solely because of the perceived availability of adequate legal remedies—regardless of the strength of plaintiff's claims on the merits—that

would presumably preclude a claim for damages under petitioners' view of causation. This, too, is illogical.

In sum, petitioners' theory of causation seeks to encumber important claims under Section 14(a) with inappropriate burdens of proof. Their attempt to subvert Section 14(a) claims by erecting such inordinate burdens must be rejected.

CONCLUSION

The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

DAVID B. GOLD
(Counsel of Record)
JOHN W. ALLURED
DAVID B. GOLD,
A Professional Law Corporation
595 Market Street, Suite 2300
San Francisco, CA 94105
(415) 777-2230

JONATHAN W. CUNEO
(NASCAT General Counsel)
Law Offices of Jonathan W. Cuneo
1300 Eye Street, N.W.
East Tower, Suite 480
Washington, D.C. 20005
(202) 962-3860

Counsel for Amicus Curiae